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**The Polygamy Paradox**  
**A Feminist Re-Understanding of Polygamy, Human Movement and Human Rights**

Holden, Sasha Marie

*Awarding institution:*  
King's College London

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*The Polygamy Paradox:  
A Feminist Re-Understanding of Polygamy,  
Human Movement and Human Rights*

Sasha Holden

0933507

PhD Candidate

King's College School of Law

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## Abstract

This thesis is about the boundaries of domestic immigration law and international human rights regarding polygamy. It considers how polygamous wives are treated, and why.

Polygamy has traditionally been viewed in the West as ‘harmful’, both to women and society. Western legal systems do not allow domestic plural marriage, and international human rights institutions recommend the prohibition of polygamy. Despite that, valid foreign polygamous marriages are recognised in the United Kingdom, particularly where it would be more harmful to do otherwise—except in immigration. The Immigration Act 1988 and Immigration Rules exclude additional polygamous wives from reuniting with their families. No exception is made and any harm that women are likely to suffer as a result is irrelevant.

This thesis argues that the treatment of additional polygamous wives, particularly in the refugee context where women are more likely to be exposed to insecurity and harm, presents a ‘polygamy paradox’. While formal objections to polygamy are apparently based on harm, they are likely to cause more harm than good. This work interrogates the stance on polygamy to consider not only its paradoxical effect, but what informs this outcome. Applying a critical legal understanding, this thesis exposes not only the unintended consequences of the law. It also highlights what has shaped legal boundaries, historically and more recently, revealing a hidden bias that undermines the legitimacy and efficacy of laws and rights.

This work concludes by offering a renewed feminist framework for the consideration of polygamy; one which takes account of gender, history and power. Ordinary epistemological foundations for the treatment of polygamy are disturbed, so the voices of women who have occupied a neglected space at the centre of laws, rights and reality as a relentlessly excluded ‘other’ are heard, and the content of laws and rights may be improved.

## Acknowledgements

My acknowledgements here are much more than the performance of a required ritual, and represent my heartfelt and genuine gratitude to all of those who are mentioned, who have supported me through to the completion of this research. I have written this thesis during a period of both profound grief and ineffable happiness, latterly experienced in isolated surroundings. It is the support and encouragement of those people mentioned here that have made getting to this point possible.

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## Dedication

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## Table of Contents

<b>Chapter 1 - Introduction.....</b>	<b>10</b>
1.1 The Prompt: the Polygamy Paradox .....	10
1.2 The Scope, Method and Aim of this Work .....	12
1.3 The Wider Narrative: The Refugee Experience for Women .....	18
1.4 The Local Narrative: Immigration Exclusions for Polygamous Wives.....	23
1.5 The Relevance of Human Rights .....	26
1.5.1 What's Wrong with Rights? .....	26
1.5.2 The Utility of Rights Talk .....	27
1.6 The Significance of a Feminist Understanding .....	30
1.6.1 Feminist Generations .....	30
1.6.2 The Utility of Postmodern Feminism .....	33
1.6.3 The Challenge of Relying on Postmodern Feminism.....	35
1.7 Outside the Scope of this Work .....	38
1.8 The Structure of this Work.....	40
<b>Chapter 2 - The Opposition: Polygamy and Harm.....</b>	<b>42</b>
2.1 The Scope of this Chapter .....	42
2.2 The Origins and Evolution of Polygamy.....	43
2.2.1 'Polygamy' Defined .....	43
2.2.2 The Evolution of Polygamy.....	45
2.3 Polygamy in Islam.....	49
2.4 The Problem of Polygamy and Harm .....	53
2.4.1 Harm in Western Society .....	54
2.4.2 Harm to Women.....	61
2.4.3 Harm and Human Rights.....	64
2.4.4 Harm and Traditional Feminist Discourse.....	68
2.5 Harm and the Regulation of Polygamy.....	71
2.5.1 Regulation in Permissive States .....	72
2.5.2 Regulation in Combined States .....	74
2.5.3 Regulation in Prohibitive States.....	76
2.6 Rethinking Polygamy and Harm .....	82
2.6.1 The Benefit in Rethinking Harm .....	82
2.6.2 The Impact of Not Rethinking Harm.....	87
2.6.3 Rethinking Harm in Practice .....	90
Conclusion.....	93
<b>Chapter 3 - The Contradiction: Polygamy in the United Kingdom .....</b>	<b>96</b>
3.1 The Scope of this Chapter .....	96
3.2 The Validity of Polygamous Marriage.....	96
3.2.1 Domestic Polygamous Marriage.....	96



3.2.2 Foreign Polygamous Marriage.....	99
3.2.2.1 Foreign Polygamy by Domiciles.....	101
3.3 The Recognition of Polygamous Marriage.....	108
3.3.1 Domestic Rights for Polygamous Spouses.....	108
3.3.2 Immigration Rights for Polygamous Spouses.....	112
3.3.2.1 The Early Approach in Immigration.....	112
3.3.2.2 The Current Approach in Immigration.....	116
3.4 Polygamous Refugee Families.....	120
3.4.1 Refugees and Family Reunification.....	120
3.4.2 The Impact on Polygamous Wives.....	124
Conclusion.....	125
<b>Chapter 4 - The Problem: The Promise and The Failure of Human Rights.....</b>	<b>127</b>
4.1 The Scope of this Chapter.....	127
4.2 The Promise of Rights.....	128
4.2.1 International Human Rights.....	128
4.2.2 Regional Human Rights.....	130
4.2.3 Domestic Human Rights.....	134
4.2.4 The Future of Rights in the United Kingdom.....	135
4.3 The Efficacy of Rights.....	136
4.3.1 The Efficacy of Refugee Rights.....	138
4.3.1.1 The Scope of Human Rights for Refugees.....	138
4.3.1.2 The Trouble with Refugee Rights.....	142
4.3.2 The Efficacy of Women's Rights.....	148
4.3.2.1 The Scope of Human Rights for Women.....	148
4.3.2.2 The Trouble with Women's Rights.....	151
4.3.2.3 Women's Rights and Polygamy.....	155
4.3.2.4 Why Women's Rights Get Polygamy Wrong.....	157
4.4 The Failure of Rights.....	163
4.4.1 How Rights Fail: Universality.....	166
4.4.2 Why Rights Fail: Culture.....	169
4.5 The Future of Rights.....	173
Conclusion.....	180
<b>Chapter 5 - The Reply: A Renewed Feminist Approach to Polygamy, Human Movement and Human Rights.....</b>	<b>183</b>
5.1 The Scope of this Chapter.....	183
5.2 Feminism and Islam.....	185
5.2.1 Western Feminist Concern.....	185
5.2.2 Islamic Feminism from Within.....	190
5.3 A Reframed Feminist Approach to Polygamy.....	196
5.3.1 The Basis for a Feminist Re-evaluation of Normative Neutrality.....	197

5.3.2 A Governance Feminist Critique .....	199
5.3.3 A Renewed Feminist Reply.....	204
5.4 The Outcome: The Polygamy Paradox and Reform .....	211
5.4.1 The Basis for Law Reform.....	211
5.4.2 Domestic Law Reform.....	214
5.4.2.1 The Recognition of Polygamy in Immigration.....	214
5.4.2.2 The Bigamy Hurdle .....	217
5.4.2.3 The Public Policy Hurdle.....	217
5.4.3 Human Rights Law Reform.....	223
Conclusion.....	226
<b>Chapter 6 - Conclusion.....</b>	<b>231</b>
<b>BIBLIOGRAPHY .....</b>	<b>234</b>
<b>CASES, LEGISLATION .....</b>	<b>261</b>
<b>AND OTHER LEGAL INSTRUMENTS.....</b>	<b>261</b>
<b>TABLE OF ABBREVIATIONS .....</b>	<b>267</b>

## Chapter 1

### Introduction

#### 1.1 The Prompt: The Polygamy Paradox

The prompt for this research comes from my experience with refugee families seeking resettlement.<sup>1</sup> I became aware of immigration restrictions that prevent polygamous families from reuniting while working with a local refugee resettlement charity in New Zealand in 2006. As a result of immigration exclusions on additional polygamous wives, affected women faced indefinite separation from their families, leaving them isolated and often unsafe in refugee settings. Colleagues who were closer to those families affected told stories of great distress among family members and concern for wives and mothers who were left behind. Families

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1 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A 'Definition of the term "Refugee"'. Where refugee status is established, the applicant becomes a 'refugee' for Convention purposes and may not be returned to the home jurisdiction according to the principle of '*non-refoulement*' and she must be treated according to minimum standards (Refugee Convention, Article 33.) For further discussion and explanation, UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees UN Doc HCR/IP/4/Eng/REV 3 (2011). The term 'refugee' will be used in this work also to refer to asylum-seekers and displaced persons, including the additional wives of anyone seeking asylum. While 'displaced' generally means forced to flee but remain within the borders of one's native country, it too may also be used throughout this research as an umbrella term for displaced people and refugees. The terms 'displaced women' and 'refugee women' are used interchangeably throughout this research to refer to women in refugee families who are displaced and whose husbands or other family members have applied for refugee status. Similarly, the term 'refugee settings' refers to transit facilities, reception centres, refugee camps, places of detention for asylum-seekers, way-stations during repatriation movements, and centres for communities of internally displaced persons, as well as anywhere else more generally on the journey of someone who is displaced and seeking refuge. The term 'migrant' is generally used to denote people who make a conscious decision to leave their countries to seek a better life elsewhere, although it is accepted here that many who do so take extraordinary risks because their day to day lives force them to do so, for themselves and their families. For general guidance, see: International Rescue Committee, 'What is a Refugee? What is a Migrant? Inside the Humanitarian Crisis in Europe' (Report) (24 September 2015). While there is not scope within this work to enter into the debate regarding the relative needs and assistance which ought to be offered to those who are considered 'asylum-seekers' and those who are considered 'migrants' the recommendations in this research might properly extend to people who have fled their country of origin without meeting the strict refugee definition, including those who are fleeing natural disasters, war or civil unrest. Although these individuals might not be entitled to the strict and increased protection offered under the Refugee Convention, their circumstances may, in practice, still be seeking a form of refuge. For a discussion on definitions of 'refugee' see Hathaway, James, *The Law of Refugee Status* (CUP, 2014) and Andrew Shacknove, 'Who is a Refugee?' (1984) 95 Ethics 274.

already harmed by conflict, violence and fear were deeply affected by the prospect of permanent, forced separation. The impact of this restriction, for the entire family but especially for those women permanently excluded, made me uneasy. On the one hand I was well used to the arguments against polygamous marriage, particularly in a religious context. The women generally affected by the immigration exclusions I had stumbled across were Muslim women in Islamic polygamous marriages, and the inequality presented by the fact that only men are able to take additional wives according to Islamic tradition, along with the potential for emotional, financial and other hardship arising out of a collection of women sharing a husband, all seemed like sound reasons to me (among others) to reject polygamy. On the other hand, it also seemed absurd to exclude additional wives because of fears over the damage that polygamy might cause to women, while that very exclusion left these women more vulnerable than ever to serious physical and sexual harm, not to mention the emotional trauma of their on-going separation. The state's response to polygamy in immigration presented me with a paradox.<sup>2</sup> Because of liberal concerns over the harm that polygamy might cause to women and society, women were being denied family reunification, and they were being placed ever more in harm's way.<sup>3</sup>

The fate of those women who were left behind raised many questions. What is the basis for excluding polygamy in immigration? Are valid polygamous marriages always treated this way by other domestic laws? Is there any flexibility in the immigration system for women who are displaced and facing great personal harm as a result of their exclusion? Do rights guarantees intervene to offer protection in the shape of women's rights, refugee rights, anti-discrimination standards or any other rights claims that might be made to challenge the state's unconditional

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<sup>2</sup> The idea of a 'polygamy paradox' is not new, having been referred to in a number of books and articles, particularly recently. Martha Bailey and Amy Kaufman in *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy* (Praeger, Santa Barbara 2010) 137 refer to the "...paradox of polygamy" as, however harmful, polygamy can also be the source of rights and protections for women and children, so that disapproval may have detrimental consequences. It is not just academics who have spoken of a polygamy paradox but also the mainstream media, including Time magazine, see Nancy Gibbs 'The Polygamy Paradox' *Time* (20 September 2007), writing about the case of Warren Jeffs, who was prosecuted for aggravated sexual assault, including offences committed against young girls he considered his 'spiritual wives' and sentenced to life in prison, plus a further 20 years), although she was concerned with the state's interest in protecting children versus the right to religious freedom.

<sup>3</sup> The majority of sponsors for family reunion applications are male, while 95% of those seeking reunion were women and children. Jacob Beswick, British Red Cross, 'Not So Straightforward: The Need for Qualified Legal Support in Refugee Family Reunion' (Report) (2015) <<http://www.refworld.org/docid/560cfcde4.html>> accessed 18 April 2017, 6.

exclusion of polygamous wives? Further, given it is only ever women who are excluded under laws that restrict family reunification for polygamous families, what does feminist theory have to say about polygamy in this context? Are these women viewed as pariahs for their complicity in an apparently unequal and odious form of marriage, or does anyone who advocates for feminist aims broadly accept the agency and free choice of Muslim or any other women to enter into polygamy? Or do those who call themselves ‘feminists’ continue to view the censure of additional polygamous wives as acceptable, even when its paradoxical quality becomes apparent? Questions like these highlighted the tension between women’s own personal experiences of polygamy and its formal treatment according to domestic laws and international rights, prompting this interrogation of the legal restrictions on polygamy and the related enquiry into whether there is support provided to displaced women by human rights or feminist discourse.

## 1.2 The Scope, Method and Aim of this Work

My desire to investigate the problem of polygamy is not unique, particularly of late. Such investigations have been increasing in a range of Western legal settings.<sup>4</sup> Since this work began there has been a particularly prolific rise in interest in polygamy in Canada following the constitutional referral of criminal prohibitions on polygamy to the Supreme Court of British Columbia in the *Bountiful* case in 2010.<sup>5</sup> A range of publications emanating from Canadian academic sources have recently investigated topics including the history of polygamy, its impact on women and children, as well as the possibility of its de-criminalisation and recognition.<sup>6</sup> The ‘polygamy question’ has also increasingly been asked across the border, in

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4 The term ‘West’ together with other terms like ‘Western’ and ‘global North’ are used in this work loosely to gather together states sharing similar political ideologies and legal policies, including North America, Europe, the United Kingdom and Australasia. For further discussion and a definition of ‘the West’, see Rex Adhar, *Shari’a in the West*, Chapter 1, where he also discusses the relationship between Islam and the West, a subject which will be picked up in the conclusion to this work.

5 *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (referred to here as the ‘Reference’ case, or ‘Bountiful’).

6 For examples of recent Canadian texts applying a broad investigative approach to polygamy in the West, see Martha Bailey and Amy Kauffman *Polygamy in the Monogamous World* (n 2) and Gillian Calder and Lori G Beaman, *Polygamy’s Rights and Wrongs: Perspectives on Harm, Family and Law* (UBC, 2014). Particularly relevant to this research is the empirical study carried out by Angela Campbell which examines the disjuncture between personal narratives of polygamy and official responses to it in the Mormon setting. Campbell’s conversations are documented in ‘Wives’ Tales: Reflecting on Research in Bountiful’ in Provost, René and Sheppard,

the United States, where academics have probed the reasonableness of polygamy prohibition by analysing its relationship to the extension of the concept of marriage to include same sex couples and the regulation of more informal multiple relationships, such as those that are polyamorous.<sup>7</sup> Whether it remains fair to outlaw multiparty cohabitation has been questioned directly in case law, leading to increasing concern over the criminalisation of plural relationships, including in situations where they manifest as religious polygamy.<sup>8</sup> Some commentators have gone even further, highlighting the positive effects of legalising polygamy and offering innovative methods for its regulation, including the application of commercial partnership rules to intimate relationships involving more than two partners.<sup>9</sup> Polygamy has also been a topic of conversation in the United Kingdom and Europe, albeit less enthusiastically, where the discussion has tended to focus more on Muslim rather than Mormon polygamy owing to its connection with historic and current migration patterns into the region and the relative lack of traditional Mormon communities. Here, it is easy to find many examples of alarm being expressed in the mainstream British press regarding the ‘swarm’ of migrants who threaten ‘British values’, the increasing numbers of Muslims living in Britain, and the rise of polygamy as a result.<sup>10</sup> In this context, it is legal pluralists who have largely

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Colleen (eds) *Dialogues on Human Rights and Legal Pluralism* (Springer, New York 2013); ‘Bountiful Voices’ (2009) 47 Osgoode Hall Law Journal 183 and ‘Bountiful’s Plural Marriages [2010] International Journal of Law in Context 343.

7 For a perspective on polygamy and same sex marriage, see Maura Strassberg, ‘Distinctions of Form or Substance: Monogamy, Polygamy and Same Sex Marriage’ (1997) 75 North Carolina Law Review 1501. She also considers polygamy in the context of other plural relationships in ‘The Challenge of Post-Modern Polygamy: Considering Polyamory’ (2003) 31 Capital University Law Review 43. See also *Lawrence v Texas* 539 US 558 (2003), where Justice Scalia pours particular scorn on the idea of allowing gay sex in private for fear of the implications of doing so in encouraging other ‘immoral’ practices, including polygamy. The ‘polygamy question’ is asked in the eponymously titled book, by north American academics Janet Bennion and Lisa Fishbayn Joffe (eds) *The Polygamy Question* (Utah State University Press, 2016).

8 See in particular, Bailey, Martha and Kaufman, Amy J, ‘Should Civil Marriage Be Opened Up To Multiple Parties?’ (2015) 64 Emory Law Journal 1747 and their discussion on public policy in their jointly authored text, n 6. *Brown v Buhman* (DC No 2:11-cv-0652-CW) (Utah District Court, Central Division) and the appeal, *Brown v Buhman* No. 14-4117 (10th Cir. 2016) (April 11 2016).

9 See also Shayna Sigman, ‘Everything Lawyers Know About Polygamy is Wrong’ (2006) 16 Cornell Journal of Law & Public Policy 101, Emily Duncan, ‘The Positive Effects of Legalizing Polygamy: “Love Is a Many Splendored Thing”’ (2008) 15 Duke Journal of Gender Law & Policy 315 and Elizabeth Emens, ‘Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence,’ (2004) 29 NYU Rev L & Soc Change 277. Some academics have written on non-Mormon polygamy in north America, including Adrien Wing in ‘Polygamy in Black America’ in her text *Critical Race Feminism: A Reader* (2nd edn NUP, New York 2003). Regarding regulation, Adrienne Davis, ‘Regulating Polygamy: Intimacy, Default Rules and Bargaining for Equality’ (2010) Vol 110 No 8 Columbia Law Review.

10 For some examples, see Rachel Stewart ‘The Men with Many Wives: the British Muslims who practise polygamy’ *The Telegraph* (London 24 September 2014) <<http://www.telegraph.co.uk/culture/tvandradio/11108763/The-Men-with-Many-Wives-the-British-Muslims-who-practise-polygamy.html>> (accessed 20 January 2015). More recently, efforts by a Muslim man to establish one Muslim

made up the body of academics reacting to dispel that alarm, arguing for increasing recognition of traditional practices like polygamy, both domestically and in some instances, also in immigration.<sup>11</sup> Their basis for doing so is more often than not strongly anchored in a straightforward pragmatism and the argument that strict prohibition is simply unlikely to be successful among migrant communities.<sup>12</sup>

Although interest in polygamy has undoubtedly been on the rise in a range of jurisdictions in the West, and while the discussion in each context bears some relevance to this work, none investigates the specific problem of Muslim polygamy in the refugee context in the United Kingdom together with the role of human rights institutions and vernacular of feminist thinking, as this work will do. This research attempts to offer not only a detailed consideration of the paradoxical effect of the immigration ban on polygamy in the United Kingdom, but also a critical analysis of the more general response to polygamy in law, rights and feminist thought. While the motivation for doing so undoubtedly stems from concern over the harm experienced by women who are unable to reunite with their families, this work is occupied with more than just challenging formal indifference to the effect of legal and human rights boundaries when it comes to polygamous wives. It seeks also to challenge the normative basis for those boundaries by deconstructing purely positivist accounts of law and rights regarding

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only and another more open polygamy-specialist dating agency, have sparked condemnation and comment, Catherine Bennett 'Polygamy is not a cultural conceit. It is an affront to Women' *Guardian* (10 July 2016) <<https://www.theguardian.com/commentisfree/2016/jul/09/polygamy-uk-sharia-law-home-office-review>> (accessed 2 May 2017). Sue Reid, 'The truth about polygamy: A special investigation into how Muslim men can exploit the benefits system' *The Mail Online* (24 September 2011) <<http://www.dailymail.co.uk/news/article-2041244/Polygamy-Investigation-Muslim-men-exploit-UK-benefits-system.html>> accessed 11 March 2016 Migrants were referred to as a 'swarm' by then Prime Minister, David Cameron, which was roundly condemned by human rights groups, see Jessica Elgot and Matthew Taylor 'Calais Crisis: Cameron condemned for 'dehumanising' description of migrants' *Guardian*, 30 July 2015.

11 Prakash Shah, 'Attitudes to Polygamy in English Law' (2003) 52 ICLQ 369 and 'Trans-Jurisdictional Marriage and Family Reunification for Refugees in the United Kingdom' (Research Paper) (2010) Queen Mary University of London, School of Law, Legal Studies Research Paper No 66/2010 and *Legal Pluralism in Conflict: Coping with Diversity in Law* ((Glasshouse, 2005). Federica Sona 'Polygamy in Britain' Osservatorio delle Libertà ed Istituzioni Religiose, (Newsletter) n 33/2005 July 2005 <[http://www.olir.it/areetematiche/104/documents/Sona\\_Polygamy\\_in\\_Britain.pdf](http://www.olir.it/areetematiche/104/documents/Sona_Polygamy_in_Britain.pdf)> accessed 11 April 2017.

12 Shah, Attitudes to Polygamy (n 11).

polygamy, making visible the wider social and political context in which those rules originate and function.<sup>13</sup>

To that end, the first task of this work is to expose the tension between the law and its effect in practice. It will also attempt to reveal the influence of particular constituencies and institutions when it comes to the content of law and rights; an influence that is all too often unseen or considered beyond criticism. In this regard, this critique aims to reflect not only on the impact of the law, but on the factors which have shaped the law, both historically and today, using feminist, postcolonial and other critical legal discourses to bring to light the force of gender, history and power as discernable factors which shape legal and human rights boundaries. Ultimately, the aim of this work is to understand not only where legal boundaries are drawn and who is affected by them, but also, why they are shaped in a particular way.

In offering a renewed examination of polygamy, this work will bring many different disciplines together—refugee law, immigration law, international law, human rights law, critical legal thought and feminist thinking—applying them in the context of migration and Muslim polygamous marriage, in answering the primary question for review. That is, whether universal prohibitions on polygamy evidence hidden bias at play when immigration laws and human rights standards are made and implemented, a bias which undermines their legitimacy and is likely to have a negative impact on the lives of less powerful and less influential groups of women. Here, women who occupy a neglected space between the laws which govern them and the day-to-day reality of their lives will illustrate the importance—necessity, even—of engaging with other, historically less dominant groups, whose narrative is largely ignored in traditional legal, human rights and feminist discourse in the context of polygamy. In carrying out this critical analysis, it is hoped this work will make a small contribution to the development of laws, human rights and feminist thought. First, in establishing a feminist re-

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13 Peer Zumbansen, 'How, Where, and for Whom? Interrogating Law's Forms, Locations and Purposes' (Lecture) King's College London (April 2016) 14, discusses the sociological suggestion to deconstruct "... legal positivism's purported stronghold over lived experiences" to recognise the tension between law and lived experiences, suggesting the revival of legal pluralism to engage productively with alternative experiences and narratives. See also Zumbansen, 'Where the Wild Things Are: Journeys to Transnational Legal Orders, and Back' (Paper) Dickson Poon Transnational Law Institute, King's College London Research Paper Series (July 2016).



understanding of polygamy which offers a new and more thoughtful approach to its regulation in law and rights so that the voices of those who are negligently ‘othered’ may be heard. Second, by pointing out the potential for rights and feminist aims to do great harm to women who are not part of the power mainstream, and call on Western states, international institutions and activists to reassess the basis for their unconditional objections to the practices of the ‘othered’, such as polygamous marriage.

Because the emphasis of this work is on hearing the voices of a particular group of othered women, two important considerations must be noted before proceeding with the substantive analysis. First, the common thread weaving throughout each topic for consideration is the development of the law with regard to its history and its relationship with wider society, including any unintended consequences and contradictions that arise for a specified, marginalised group of women. In that regard, the dominant methodology for this work is socio-legal because great emphasis is placed on the power that is wielded by law in society, as this work questions the relationship between dominance, identity and the legal standards. However, in considering the impact of the law in society, this work has had to manage the limited availability of empirical and descriptive accounts of those who are the focus for this research; that is, Muslim women in polygamous marriages, particularly in the refugee context. While there has been a prolific rise in academic interest in Mormon polygamous communities, the comparative dearth of material relating to the experiences of Muslim polygamous families, particularly those who are displaced, has necessitated some methodological resourcefulness on my part. In considering women’s varied experiences polygamous marriage and claims about harm, this work has been forced to rely more heavily than desired on the empirical accounts of Mormon women. While these accounts are undoubtedly helpful in debunking ordinary assumptions about harm and illustrating the possibility of a range of experiences of polygamy, the limitations of this approach are also noted. The lives of women in isolated Mormon communities in Canada or the United States arguably have little in common with Muslim polygamous wives, particularly those who are dispersed and separated from their husbands, sister wives and families in refugee settings. While I am alive to such distinctions, however, I also take the view that any limitations in relying on empirical resources regarding polygamy for Mormon families is mitigated by the analogies that may be drawn between two systems of religious, polygamous marriage among largely conservative and often isolated or excluded

communities. I take the view that the lived experiences of one group of othered women are relevant and helpful in identifying the way in which polygamous wives are more generally forced to navigate identity, power and the law when it comes to polygamy, harm and regulation. In addition, while domestic, Mormon accounts of polygamy may also have little to do with conflict or displacement, this work has sought separately to ameliorate that distinction and understand and explain women's experience of displacement by relying on reports from a range of governmental, non-governmental and charitable organisations. In this regard, although the methodological framework this work adopts may be imperfect, it is borne of practical and unavoidable limitations and, when combined with what little material there is on Muslim women and their experience of polygamy, it provides a stable methodological basis for further discussion, and to draw sound conclusions.

Second, in addition to the empirical limitations this work has had to grapple with, it is also unavoidably grounded in my own perspective, that of a woman of joint New Zealand and British descent. The voice driving this work is that of a white, Western lawyer and academic. Although anchored in my own experience of jurisdictions where domestic plural marriage is outlawed, and where both refugees and Islam are more likely than ever to be feared, this research will attempt to understand polygamy without relying on familiar cultural and legal principles. In doing so, it is accepted that the contribution made here to the many academic commentaries seeking to reduce the invisibility of historically less powerful women must, of itself, lack the 'distinctive voice' that other women may use to express their own experience of subordination.<sup>14</sup> While every effort is made to 'world travel' as recommended by postmodern, postcolonial and other critical feminist theorists, and to treat other cultural and legal traditions with equal respect, it is acknowledged that the particular perspective brought to this work is also 'rooted' in my own experience. As someone who has worked with the refugee community but never experienced life as a refugee, even if my perspective may be shifted so as to privilege the experience of others, I have no direct experience of polygamy, displacement or exclusion. Despite that, there remains value in this work if it is able to assist

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14 This work borrows from Adrien Wing 'Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty First Century' (2001) 11 *Journal of Contemporary Legal Issues*, where she refers to Professor Mari Matsuda's notion of a "distinctive voice" in Mari Matsuda 'Looking to the Bottom: Critical Legal Studies and Reparations' 22 *Harv CR – CL L Rev* 323 (1987) n 22, 816.

even in some small way in *translating* perspectives on polygamy, human movement and human rights, to de-marginalise the lives and concerns of other women.<sup>15</sup> In this case, it is hoped this work might be accepted as a worthwhile attempt to encourage a refreshed discourse between those who are more usually institutionally voiceless and those who are much more likely to wield political, economic and social power, by bringing the story of the former to the fore. In this role I do not seek to assert any authority to speak on anyone's behalf. Rather, I simply hope to make the constituency I speak about more visible, with the aim of encouraging others to hear their eloquence and their experience.

More immediately, the remainder of this chapter will introduce the wider narrative of women in refugee settings, grounding the entirety of this research in its socio-legal roots and explaining why the experience of human movement for these women is so often more trying than it is for men, in the hope also of conveying why this research matters. Next, the local narrative of immigration laws which restrict the entry of polygamously married wives and which are the focus for this research will be introduced and charted for the reader, laying a foundation for a review of inconsistencies in domestic legal approaches to polygamy in a later chapter. This introduction will then turn to modern human rights standards, beginning with a brief discussion of the origins of human rights and their development over time, with the aim of explaining where human rights come from and the ambit and efficacy of rights in their modern form. Thereafter, the final topic to be introduced here is feminist thought—the primary theoretical thread which weaves through this work— providing a basis for the suggestion in later chapters that the laws and standards which prohibit polygamy are gendered, in giving effect to disproportionately harmful outcomes for certain groups of women, despite acting under the guise of 'protection'.

### **1.3 The Wider Narrative: The Refugee Experience for Women**

It is hard for most people to imagine being forced to run from war. It is perhaps unimaginable for anyone that they might, having successfully escaped conflict and insecurity, find themselves

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<sup>15</sup> Wing (n 14) 813, refers to the task she is assigned to 'translate' the practice of polygamy for the American legal audience, in a way which is not sensationalist or essentialist but sensitive to the cultural and legal dynamics of the societies in which it operates.

at risk of more danger in the very place they had hoped to find safety. This is the experience of many female refugees, however.<sup>16</sup> Very high numbers of women who become displaced experience fear, harm and exploitation, simply because they are women. Where families are separated, it is women who are subjected to a particularly heightened risk of harm. Moreover, when women suffer physical, sexual and other forms of violence in the refugee setting, they often have nowhere to turn. Little relief or support is available and they are regularly too frightened to seek help anyway, for fear of more violence by way of reprisal or because they will be stigmatised by their own communities. Hardship in the refugee setting is therefore compounded because women are scared to report abuse or ask for help because they are worried about negative repercussions, such as being humiliated, deported, tortured, or suffer some other form of violence at the hands of officials.<sup>17</sup> Hardship and fear also mean displaced women are often dependent on the kindness and help of others who do offer help, to survive and meet their basic needs. In turn, that reliance makes them more vulnerable to additional hardship than their male counterparts, whose offers of help may themselves come with unwanted conditions and the risk of yet more harm.<sup>18</sup>

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16 Although it is widely accepted that women are exposed to greater risks than men in refugee settings, and that life as a refugee is generally very difficult, there are competing views about the refugee experience in camps. For an example, see Kirsten McConnachie in *Governing Refugees: Justice, Order and Legal Pluralism* (Oxford Routledge, 2014) where she seeks to challenge ordinary assumptions about refugee camps, saying they may be spaces where political, cultural and social lives are lived. However, the prevailing view of refugee settings is as a place where life is typically disordered, and insecure, and where women are arguably at a distinct disadvantage, because of a structural bias the camps themselves and the entire asylum process, see Alice Bloch and others, 'Refugee Women in Europe: Some Aspects of the Legal and Policy Dimensions' (2000) 38(2) *International Migration* 169 where the authors call for a re-think of policy and legislation in Europe; Sarah Kenyon Lischer, *Dangerous Sanctuaries: Refugee Camps, Civil War and the Dilemma of Humanitarian Aid* (Ithaca and London, Cornell University Press, 2005).

17 United Nations Committee for the Elimination of All Forms of Discrimination against Women 'General Recommendation 33' on Women's Access to Justice (23 July 2105) CEDAW/C/GC/33, paragraph 10 discusses women's unwillingness and inability in certain situations to get access to justice, a detriment which is greatly exacerbated in the refugee setting. Also relevant in this context is UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation 32' on the Gender Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, (adopted 5 November 2014) UN doc CEDAW/C/GC/32.

18 Amnesty International 'I want a safe place: Refugee women from Syria uprooted and unprotected in Lebanon' (Report) (February 2016) (file:///Users/Holden/Downloads/MDE1832102016ENGLISH.PDF, last accessed 16 March 2016) 47, saying such conditions included sexual activity and 'temporary' offers of marriage in return for assistance; and Office of the High Commission for Human Rights, 'Women's Rights are Human Rights', (Report) (New York and Geneva, 2014) <<http://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf>> accessed 21 February 2017 which discusses the human rights framework in practice, and the impact of migration and displacement on women's rights at Part V, 86.

Women in refugee settings have expressed their humiliation and fear at being considered available and ‘easy to get’ simply by virtue of their being alone, as well as their frustration at being unable to complain because their lack of formal status makes them too vulnerable to do anything to stop what is happening to them.<sup>19</sup> As explained by the Director of International Crisis Response at Amnesty International,

*After living through the horrors of the war ... women have risked everything to find safety for themselves and their children. But from the moment they begin this journey they are again exposed to violence and exploitation, with little support or protection.*<sup>20</sup>

While refugees hope, and ought to be able to expect, that once they flee conflict they will be safe, the truth for many is that they simply face a different type of harm when they begin a new existence as a refugee. For women on their own, the risk of experiencing this new harm is undoubtedly much, much greater.<sup>21</sup> Despite the incredible resilience and strength so often

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<sup>19</sup> Amnesty International report (n 18) 45, 52. Amnesty interviewed women in Lebanon, who had fled Syria and who reported their experiences of sexual harassment and exploitation, which was worse for those women on their own. Women noted their reluctance to report any crime for a range of fears. For recent testimony, see Mark Townsend “Women and children ‘endure rape, beatings and abuse’ inside Dunkirk’s Refugee Camp” *The Guardian* Sunday, 12 February 2017 (<https://www.theguardian.com/world/2017/feb/12/dunkirk-child-refugees-risk-sexual-violence>, last accessed 12 February 2017) where one woman travelling on her own was reported as saying unaccompanied women and children were viewed as prey, “All men see that I’m alone ... [M]en see me and they want to rape me.” An NGO worker was quoted in the same article as saying that men targeted women and children because of their vulnerability and talked of men in the refugee setting being ‘disconnected from reality’ meaning serious violence and abuse was more likely.

<sup>20</sup> Amnesty International report (n 18). For additional NGO commentary on women’s refugee experiences see International Rescue Committee ‘Are We Listening: Acting on our Commitment to Women and Girls Affected by the Syrian Conflict’ (Report) (September, 2014) and Human Rights Watch ‘Welcome to Kenya: Police Abuse of Somali Refugees’ (Report) (June 2010) which highlights the plight of refugees at the Dadaab Refugee Camp, in particular the discussion on violence against women without male relative, at page 55.

<sup>21</sup> See also, UNHCR Executive Committee 56th Session ‘Conclusion on Women and Girls at Risk’ 105 LVII (6 October 2006) UN Doc A/AC.96/1035. Beswick, Jacob, British Red Cross, ‘Not So Straightforward: The Need for Qualified Legal Support in Refugee Family Reunion’ (Report) (2015) also confirms that while 51% of applicants for family reunion were exposed to security risks, 96% of those exposed were women and children. The report also notes United Nations Security Council Resolution 1325 on Women Peace and Security (31 October, 2000) which registers “... concern that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and internally displaced persons, and are increasingly targeted by combatants and armed elements”. The United Kingdom instituted a National Plan on Women, Peace and Security following UNSC 1325 (Foreign and Commonwealth Office ‘United Kingdom Action Plan on Women, Peace and Security’ (2014)) calling on UK officials to see gender as central to their work on conflict, stability and security and routinely integrate, assess and evaluate the gender

displayed by women who are forced to leave their homes, the risk of discrimination and gender specific violence is real; a fact verified by United Nations agencies and reported more widely.<sup>22</sup>

The experiences of women in refugee settings, in particular where gender-based violence occurs, is a form of discrimination prohibited under international human rights law.<sup>23</sup> According to international obligations, and following the work of activists to bring the structural nature of violence against women into the vernacular of international human rights protection, states are obliged to take steps to prevent this type of discrimination, including where it is perpetrated by third parties, so that displaced women have protection.<sup>24</sup> Yet, in practice, isolated refugee women often remain at continued and much-heightened risk, some of who will be Muslim wives in polygamous marriages.<sup>25</sup> Where their husbands have achieved

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implications of policies, legislation and programming 'where appropriate'. The report by Beswick also confirms at page 15 that "... the majority of sponsors [for family reunification] are men and the majority of applicants are women and children – whose vulnerability in insecure environments is universally recognised." The disproportionate harm suffered by women in refugee settings has also been known about for some time, see Anders B Johnsson 'The International Protection of Women Refugees; A summary of Principal Problems and Issues 1 Int'l J. Refugee L. 221 (1989) for an early exposition on the peculiar harm faced by women in refugee settings. It remains a topic of concern today, see Phoebe Greenwood 'Rape and Domestic Violence Follow Syrian Women into Refugee Camps' The Guardian (25 July 2015) quoting Melanie Megvand, a specialist in gender based violence at International Rescue Committee on the particular predicament of women in the refugee setting.

22 UNHCR 'Conclusion on Women and Girls at Risk' (n21).

23 UN Committee for the Elimination of All Forms of Discrimination against Women 'General Recommendation 19' on Gender Based Violence, adopted at the Eleventh Session of the Committee on the Elimination of Discrimination against Women (1992) UN Doc A/47/38, paragraph 6. See also the following report on violence against women by the International Commission of Jurists, 'Women's Access to Justice for Gender Based Violence: A Practitioner's Guide (February, 2016), highlighting the description of violence against women as a 'pandemic' and noting the special challenge to women who are in refugee settings. See also UN Secretary-General, 'In-depth study on all forms of violence against women' UN Doc A/61/122/Add 1 (2006) paragraph 334, where he states women's physical, psychological and reproductive wellbeing can severely be compromised in refugee settings.

24 CEDAW General Recommendation 19 (n 23), paragraph 9. According to the Committee, under the CEDAW convention states have a due diligence obligation to prevent gender-based violence and can be responsible for private acts where they fail to do so. This means they must take appropriate measures to prevent such acts by private persons whether they are family members, neighbours, landlords or strangers. In Europe, the Council of Europe Convention on Combating Violence Against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS No 210 is the primary tool for protecting women and girls against sexual and gender based violence, requiring states in Europe to ensure that gender based violence is recognised as a form of persecution, and also requiring states to introduce gender sensitive procedures in the asylum process.

25 A Freedom of Information request to the Home Office on was made on 7 July 2016, in an effort to establish just how many additional polygamous wives might be denied family reunification each year. The Home Office responded by refusing to provide information on the number of family reunion applications made by Muslim families, and the number who are refused because of the polygamous nature of their family, citing their statutory right to do so pursuant to s 12 Freedom of Information Act, on the basis of cost. Other agencies have responded to requests for information by confirming they do not collect or store this information. Responses to

refugee status in a safer place it will be their hope to take advantage of their associated right to join their families. In the United Kingdom, however, their marital status prevents that reunion. Here, despite valid polygamous marriages being recognised for other reasons, including in family law and for other matters like inheritance and access to social security assistance, in immigration, objections to polygamy trump the harm that such women are likely to suffer as a result of remaining displaced and alone. Judgment is passed by the state on these women because of their marriages, and laws which directly affect them are seemingly made without thought for their impact. Perhaps most remarkably, their transnational abandonment by states and the human rights establishment is often carried out in the name of both feminism, and women's rights.<sup>26</sup>

In addition, while the constituency of women this work focuses on is likely to be relatively small, the recent crisis of human movement happening in Europe, Africa and the Middle East has ascribed more broad significance to the matters raised in this research.<sup>27</sup> At the time of writing, approximately sixty million people have forcibly been displaced as a result of various conflicts around the globe and an estimated fifteen million people are seeking refuge, with those numbers considered very likely to continue to rise as increasing numbers of people fleeing conflict today are leaving states which are in deep crisis.<sup>28</sup> Exact information on the

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requests for information were also received from Amnesty International, Women's Refugee Commission and American Refugee Committee confirmed they do not hold this information. Requests to Women for Refugee Women, Refugees International, the International Rescue Committee received no response.

<sup>26</sup> Although it is clear that additional polygamous wives do not qualify for a spousal visa or to come as a dependant of a person who has been recognised as a refugee, they are able to submit their own asylum claim and benefit from other types of leave to remain, like exceptional leave to remain, discretionary leave to remain, humanitarian protection (which may not necessarily meet the refugee definition), and others, including completely separate claims for entry, for example as a student if this were available. In this regard, although a polygamous wife cannot be sponsored by someone who has been recognised as a refugee, she can assert a refugee claim in her own right, or she can request permanent residence via alternative routes. However, while other mechanisms for entry may be available, where the individual circumstances can be taken into account the exclusion of additional polygamous wives for the most direct route, that of family reunion, remains problematic, because these women do not benefit at all from their family status (in the way the monogamous wives do), and they are forced to rely on the possibility of alternative claims, the criteria for which they may not meet. In this regard, while the characterisation of "universal exclusion" might be challenged because other routes are available, the easiest, that of family reunion, remains closed to polygamous wives.

<sup>27</sup> See Freedom of Information request (n 25).

<sup>28</sup> UNHCR, 'Worldwide displacement hits an all-time high as war and persecution increase' (News report) <<http://www.unhcr.org/558193896.html>> accessed 16 March 2016 and International Rescue Committee, 'The Refugee Crisis in

numbers of refugee women who are excluded from reunion in the United Kingdom because of their polygamous marriage is not available from any official source, be it governmental, non-governmental or inter-governmental, as none disaggregates data on women who are alone in refugee settings in connection with their marital status.<sup>29</sup> However, what is known is that four of the five countries with the highest number of applications for asylum to the United Kingdom in the year ending March 2016 are states with a predominantly Muslim population.<sup>30</sup> In the same year, asylum applications also increased by 38%.<sup>31</sup> The Home Office has confirmed these numbers correlate to world events, with the total number of asylum applications to the European Union in 2016 estimated to be more than double the number from the previous year.<sup>32</sup> This sharp rise in the number of people seeking refuge generally, as well as the large Muslim population seeking asylum in the United Kingdom suggests that, although the numbers contemplated by this research may be small relatively speaking, they are not insignificant and they are likely to be rising.

#### 1.4 The Local Narrative: Immigration Exclusions for Polygamous Wives

Britain has exercised some form of immigration control since medieval times and with the continued expansion of formal rules for immigration management since the early expulsion of ‘alien’ Jews in 1290, the United Kingdom has gone on to develop a broad and complex scheme of immigration regulation. Domestic law, together with international human rights standards, now form a modern system controlling the movement of people in and out of Britain, which

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Europe and the Middle East: A Comprehensive Report (Summer, 2016)  
<https://www.rescue.org/sites/default/files/document/911/irccrisisappealcompositerevaugust.pdf> accessed 19 April 2017.

29 See Freedom of Information request (n 25).

30 See Freedom of Information request (n 25). Iran, Eritrea, Iraq, Sudan and Syria, with 40% of those who applied being granted asylum.

31 The number of applications went up to 34,687, the highest number of applications since 2004, indicating they are on the rise. In addition, 2,441 people were resettled in the United Kingdom having been referred to the Home Office by the UN Refugee Agency, the United Nations High Commissioner for Refugees (UNHCR). Number of UK applications in 2016 was 34,687, the highest number of applications since 2004, indicating they are on the rise. In addition, 2,441 people were resettled in the United Kingdom having been referred to the Home Office by the UN Refugee Agency, the United Nations High Commissioner for Refugees (UNHCR).

32 In Europe, the number of asylum applications went up to 1,392,000, more than double the number in the preceding year of 684,000. For information on asylum application to the United Kingdom, see <https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2016/asylum> (accessed 10 February 2017).



extends its reach to managing the flow of migrants, as well as refugees. Today, a range of legislation relating to immigration, together with accompanying rules, provides authority for the regulation of visitors wanting to enter and remain in the United Kingdom.<sup>33</sup>

Of particular interest to this work are the 1988 Immigration Act and associated Rules, which contain the express prohibition on family reunion for women in polygamous marriages.<sup>34</sup> Although family reunification has been described by government actors previously as a “fundamental principle—not a privilege but a right ...”, and one which it would not be proper to remove, particularly for refugees, it remains the case that additional polygamous wives are expressly prevented from enjoying this right. These restrictions are absolute; no distinction is made between polygamous wives who are migrating and those who seek refuge. Additional wives in polygamous marriages are always excluded, whatever their circumstances.

Because of this restriction, polygamously married women from refugee families are left in a transnational ‘no [wo]man’s land’ without adequate protection and, on the whole, without consideration, largely because states are permitted, and strongly assert, a sovereign right to control migration with a high degree of autonomy. The rejection of this category of women is justified by reference to women’s rights, the harm polygamy might cause to society and the desire for the preservation of a dominant monogamous culture of marriage.<sup>35</sup> This established

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33 There is a wide range of legislation currently governing immigration in the United Kingdom, the most recent being the Immigration Act 2016. The general trend has been to introduce additional criteria so that those wishing to enter and remain in the United Kingdom face increasingly strict conditions when migrating, including limitations on their rights to claim state assistance, as well as to increase the state’s right to detain and deport anyone who does not meet that criteria. The 2016 Act also introduced responsibilities on those who interact with migrants to monitor their status, including landlords and employers.

34 S 2 Immigration Act 1988 is still the Act which prohibits the right of abode in cases of polygamy. Any application from a polygamous wife must be considered in accordance with Immigration Rules Part 8 (Family Members), paragraphs 278 to 280, which contain provisions to restrict settlement to one wife. In the United Kingdom, similar restrictions apply regarding any ‘derivative status’ right which might be claimed by dependants of refugees. Such a ‘right’ (albeit not one which is universally recognised by all states) is set out in the UNHCR, ‘Procedural Standards for Refugee Status Determination Under UNHCR Mandate’ which is governed in the United Kingdom by Immigration Rules, Part 11 paragraph 349 (Dependants) together with Part 8 (Family Members) and overseen in accordance with the Home Office ‘Asylum Policy Instruction: Dependants and former dependants’ (May 2014), and Home Office, Polygamous and Potentially Polygamous Marriages, Immigration Directorates’ Instructions, Chapter 8 Section FM 1.4 Partners (July 2012).

35 Fairburn, Catherine, ‘Polygamy’ (Briefing Paper 05051, House of Commons Library) 6 January 2016, 6 “Immigration issues: It has been the policy of successive governments to prevent the formation of polygamous households in the UK. In short, a UK resident

dogma in the context of polygamy and public policy is typically not questioned by law makers or human rights supporters. Despite the increasing emergence of disapproval for traditional responses to polygamy, rights-based objections to polygamous marriage and the lack of any express obligation on the state to allow polygamous family reunion are relied on to justify the abandonment of displaced, isolated women to their fate. However difficult the experiences of these refugee women, their exclusion is treated as entirely reasonable because they do not 'belong' here. Their experiences are of little interest, their situation goes unnoticed, and states may legally reject any responsibility for them.

While such arguments maintain a veneer of good reason as a result of their association with traditional liberal equality aims, this work disagrees fundamentally with them, echoing calls for an 'epistemological change' in thinking about forced migration and the management of refugees.<sup>36</sup> It will show, despite the apparent reasonableness of the United Kingdom's position, its treatment of displaced women from polygamous families has a disproportionately detrimental impact not only on women, but on certain groups of women, and is indefensible. To that end, this work will seek to offer a renewed perspective on the treatment of polygamy, one which aims to privilege the narrative of Muslim women, exiles and refugees. Not simply as passive, vulnerable subjects in need of protection, 'tolerance' and aid, however, but as individuals who possess agency, express resilience and whose own lived experience has meaning, even if it has historically been silenced by consignment to a legal and human rights vacuum, particularly in the refugee setting. In doing so, the problem with domestic immigration law will be explained in more detail and suggestions will be made for ways in which human rights and feminist thought might be better used to argue for change, to reflect the perspectives of those who are dispossessed and to reject the unhelpful 'othering' of human beings who are easily marginalised by circumstance. Here, the intention is to counter the ordinary discourse of law and rights by urging states and activists to recall the idea of a 'common humanity', so that access to that humanity is meaningfully opened up to those who speak with a different voice.

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cannot sponsor a non-EEA national for permission to enter or remain in the UK as their spouse if another person has already been granted such permission, and the marriage has not been dissolved."

36 Dawn Chatty calls for this in 'Refugee Voices: Exploring the Border Zones between States and State Bureaucracies' (2016) 32 *Refugee* 3.

## 1.5 The Relevance of Human Rights

### 1.5.1 What's Wrong with Rights?

The success of the human rights idea is reflected in the modern manifestation of rights standards in conventions and declarations regulating state behaviour. While this work is anchored in a commitment to human rights, it is acknowledged that criticisms of rights have long existed, and not without some cause. The failure of human rights law consistently to provide protection to those most in need has prompted many critics to conclude that rights are flawed, perhaps fatally. In addition, questions over the universality of rights have encouraged the argument that they are, ironically, only privileges which are enjoyed most often by those with sufficient status to assert them. Overseen by states, and more likely to be enjoyed by those citizens of countries who have the means to enforce them, it seems relevant to ask whether rights have lost their way as a universal tool to esteem every one of us. Have they become false promises—a cruel joke played on the most vulnerable, in a bleakly unequal world?

Among the range of concerns expressed about rights is their inability truly to be universal, or even to offer help to the most vulnerable and in need, including—ironically and perhaps most depressingly—those who are stateless and who are most in need of an overarching system of protection.<sup>37</sup> Such criticisms, which go to the core worth of human rights, lead naturally to the conclusion that rights must overcome serious challenges if they are to have a secure and successful future.<sup>38</sup> Other criticisms of rights include their proclivity to serve the interests and

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<sup>37</sup> This is a particular concern of Costas Douzinas, who, referencing the work of Hannah Arendt, has written much in academic publications and in the media about stateless minorities, or refugees, who have “...theoretical rights but have no real protections.” For examples, see Costas Douzinas, ‘Are Human Rights Universal?’ *Guardian* (11 March, 2009) and his text, *The End of Human Rights* (Hart, 2000).

<sup>38</sup> Conor Gearty, *Can Human Rights Survive?* (CUP, 2006) 1, who articulates various crises of rights in his work outlining various suggestions for rights if they are to survive.

needs of men<sup>39</sup> and powerful states,<sup>40</sup> and simply to act as a caretaker servicing the needs of their historical progenitor, the colonial state.<sup>41</sup>

Feminist scholars have also expressed particular concern about the true value of human rights to women. Among these concerns is that to focus on rights wastes time on a narrow discourse which oversimplifies the hidden power relations inherent in modern rights systems, and that this focus does not best serve women's interests.<sup>42</sup> Some critics have gone further, suggesting that the use of rights language risks promoting the oppression of women because particular rights, such as freedom of religion, may be used to justify discrimination.<sup>43</sup> This critique views any reliance on rights as an implicit acknowledgment of the overriding power of the state, reinforcing the powerlessness of society's female members.<sup>44</sup> In a similar vein, some critics have argued that speaking in the language of rights simply serves the interests of the most privileged women in society, for most often it is they among women who create, define and use the language of rights to serve their own cause.

### 1.5.2 The Utility of Rights Talk

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39 Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000).

40 Makau Mutua explains the basis for this concern in 'What is TWAIL?' (Paper) The American society of International Law Proceedings of the 94th Annual Meeting, April 5-8, 2000 Washington, DC. For another helpful introduction to TWAIL, see James Thuo Gathii, 'TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography' (2011) 3(1) Trade Law and Development 26. Mutua also writes authoritatively on this topic in other articles, including 'Savages, Victims and Saviours: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law Journal 201; 'The Ideology of Human Rights' (1996) 36 Virginia Journal of International Law 590.

41 See Mutua (n 40). Also Anthony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law' (1999) 40 Harvard International Law Journal 1, James Thuo Gathii, 'International Law and Eurocentricity' (1998) 9 European Journal of International Law 184.

42 Charlesworth, H and Chinkin, C (n 39) 209; Kingdom, E *What's Wrong with Rights? Problems for Feminist Politics of Law* (Edinburgh University Press, 1991).

43 Charlesworth, H Chinkin, C and Wright, S, 'Feminist Approaches to International Law' (1991) 85 American Journal of International Law 613 examine this concern with using rights.

44 Charlesworth and Chinkin(n 43).

While placing great value in the idea of rights, this work shares, to an extent, the despair with human rights guarantees. That despair is perhaps nowhere better represented than in the experiences of the women considered here; marginalised Muslim refugee women, whose freedoms are defined for them by others and who are barred from asserting their rights because they lack the necessary status, either as citizens or acceptable ‘women’ to do so. However, rather than abandoning rights as a result of that concern, this research aims to offer a solution to rights critics, however limited, to assist in resolving some of their disappointment with the efficacy of rights guarantees.

This work relies in the first instance on the important work on the boundaries of international human rights law by Christine Chinkin and Hillary Charlesworth, which supports the notion of rights as a valuable tool, in spite of their faults, and outlines a collection of justifications for using rights as a framework for the improvement of women’s lives.<sup>45</sup> Their list includes the importance of rights as a normative framework for improvement, however imperfect, and one which states are under some pressure to adhere to. Chinkin and Charlesworth go on to outline the efficacy and accountability associated with rights claims and their importance in providing an objective vocabulary for the most oppressed. This symbolic value of rights and their significance as a tangible source of hope has been referred to by other women, writing about the role of rights in critical race feminist activism. In support of rights, Patricia Williams is clear that those who are subjugated have something to gain from rights talk, which makes it possible to elevate the dispossessed to a social being, and to someone who has access to tangible protection;

*‘Rights’ feels so new in the mouths of most black people. It is still so deliciously empowering to say. It is a sign for and a gift of selfhood ... It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power ...*<sup>46</sup>

While this work takes a different view regarding some of the benefits Chinkin and Charlesworth have outlined, it does adopt the overall optimism and hope expressed by

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<sup>45</sup> Charlesworth and Chinkin (n 39) 210.

<sup>46</sup> Patricia Williams, ‘Alchemical Notes: Reconstructing Ideals from Deconstructed Rights’ (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 401 at 431.

Chinkin, Charlesworth, Williams and others like them.<sup>47</sup> Although imperfect, this work will argue that rights continue to have purpose in the context of oppression, including the oppression of women, and for this reason it is helpful to look to international human rights standards and to consider their utility in protecting women from discrimination and promoting law reform. Assisted by postcolonial, postmodern and other critical feminist approaches, this research will offer alternative ways to construct and interpret rights in the context of polygamous marriage and forced migration, in the hope of benefitting women who are currently let down by the rights project, and to promote the integrity and longevity of rights themselves, in the face of strong criticism regarding their failures. In that regard, the aim of this work is to show that rights can be what we make of them, to the advantage of women, and perhaps even for the long term betterment of rights themselves.

Critics of this attempt at legal reconstruction might sensibly make the point that it is absurd to use the same legal and human rights structures this work is critical of to try and rectify the problems it identifies.<sup>48</sup> However, this work will aim to challenge the idea that legal and human rights standards governing polygamy are objective, and make recommendations for alternative ways of framing and interpreting law and human rights so that unquestioned norms are not only questioned, but answers are also provided. The purpose of doing so is clear: revealing a hidden bias which influences laws and human rights has the potential to prompt change so that women are not discriminated against and laws and rights are more accessible for those most in need. The alternative is that human rights guarantees and domestic legal rules remain a tool, not for citizens or individuals in need, but rather, to promote the interests of the ruling class and the state. In the event the elite and the state are left alone, rules are not likely to manifest in ways which reflect the concerns of those who rely on them. In the case of human rights, this outcome reflects a bitter and unacceptable irony—one that will be challenged in this work.

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47 Chinkin and Charlesworth highlight the advantage of placing human rights at the forefront of any discussion on women's experiences which automatically prioritises rights over other factors (such as economics, or security, for example) a privileged status which is often reflected in the inclusion of international human rights standards in domestic legal arenas. That privileging of rights is something this work seeks to question, in later chapters, in particular in the discussion on human rights in Chapter 4 and the discussion on feminist approaches in Chapter 5.

48 Charlesworth and Chinkin (n 39) 59.

## 1.6 The Significance of a Feminist Understanding

### 1.6.1 Feminist Generations

This work is an explicitly feminist project. In that regard, Martha Chamallas' useful typology of feminist thought is adopted, categorising three waves of feminism in modern history.<sup>49</sup> As Chamallas explains, each feminist generation responds to its own circumstances, with later forms of feminism often critical of their predecessors, so that each wave is located in the priorities which went before, and new priorities which come after.<sup>50</sup>

The first generation Chamallas identifies is that of 'equality feminism', which is firmly rooted in liberal feminists' aims of the 1960's and 1970's and their primary goal of calling for equality with men. The focus for these early feminist activists was on access to the system of rules and expanding those rules to include women.<sup>51</sup> They were not generally critical of the rules themselves. Rather, liberal feminists relied on the state in wishing for women to have equal access to whatever the rules offered, seeking "audibility in the mainstream."<sup>52</sup> While the importance of their claims, for example to equal pay for equal work, cannot be dismissed in laying essential groundwork for later feminist agitation, the approach of liberal feminists is inherently limited in requiring women to fit into a male paradigm, and for failing to ask the rules to take account of 'essential' and immutable aspects of women's difference.

The gaps left by liberal feminist aims created space for the second generation, that of 'difference feminism', to emerge. In this phase of feminist theory and action, feminists both built on the foundations of the liberal feminist movement and took account of its limitations,

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49 Martha Chamallas *Introduction to Feminist Legal Theory* (3rd edn Wolters Kluwer, 2013).

50 Chamallas (n 49) 17.

51 One could take a longer view, of course. Awareness raising and campaigns for equality undoubtedly occurred in isolated pockets much earlier, and in other locations; for example in NZ in the late 1800s where the first successful campaign for women's universal suffrage was waged. Single issue movements like this signalled the beginning of objections to the different treatment of women and men even if they may have occurred a long while before a more broad, feminist legal theoretical vernacular emerged.

52 Janet Halley and others *Governance Feminism: An Introduction* (forthcoming, March 2018).

becoming occupied with women's difference, rather than asking for equal rights on the same basis as men. General equality aims were replaced by concern for substantive equality, which recognised the experiences of men and women were often not the same, and required the law to reflect that. Difference feminists sought to highlight that apparently neutral laws were not at all gender blind and in fact, they represented an implicit male norm which disadvantaged women, making it necessary for them to assimilate to be 'equal' and not allowing for their distinct difference. In direct contrast to earlier liberal feminists, this wave of feminist activists sought formal, legal recognition of the ways in which men and women's lives were different. Although the focus for this post-liberal generation was on difference, difference feminists expressed their goals in a variety of ways. Dominance and cultural feminists, for example, each challenged the requirement that women submit to male legal norms in the law using different approaches. While dominance feminists argued that any apparent legal objectivity simply reflected the view of the dominant group (in their view, men) using the laws on rape as a central theme to illustrate their argument, cultural feminists focused their concern more on women's lived experience.<sup>53</sup> They argued that legal norms did not reflect women's voice or their unique, gendered, experience and suggested that the law lacked consideration of women's concerns, for example, as mothers and members of their communities.<sup>54</sup>

While this second wave of feminist thought was occupied with the difference between men and women, it was not really until the third generation of feminism identified by Chamallas that the differences between women themselves were acknowledged and considered directly relevant to the feminist discussion. The emergence of the third generation of feminism, that of 'unique identities', is described by Chamallas as being concerned with the varied experiences of women and the impact of different identity on women's lives. Here, the emphasis is on recognising women as a diverse group rather than penalising women who do not conform to a dominant, or mainstream, women's norm. Arising out of the Critical Legal Studies movement in the 1980s, 'identity feminists' are demonstrably disapproving of the rhetoric of

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53 Catharine MacKinnon being the most prominent among radical feminists of this leaning, together with her colleague, Andrea Dworkin. MacKinnon's article 'Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence (1983) 8(4) Signs: Journal of Women in Culture and Society 635, was seminal in this regard. See also Charlesworth and Chinkin (n 39) 42 and Chamallas (n 49) 22, 56 on dominance feminism.

54 Charlesworth and Chinkin (n 39) 40, Chamallas (n 49) 22, 65 on cultural feminism.



earlier feminist waves for ignoring the influence of a wider cultural conflict. In focusing on the differences between women, the priority for this strand of feminist thinkers is to avoid the danger of gender essentialism, or peddling the idea that all women are the same. They also object to any 'sameness' being defined by the most dominant and powerful groups of women in society. Identity feminists reject the idea that all women experience oppression in the same way, or that all women speak with one voice in relation to men. Rather, this third generation of feminist thinkers allows for the consideration of a range of differences in privileging women's experiences, including women's race, class, sexuality, ethnicity and religion, as well as their immigration status. Accordingly, the rhetoric of identity feminists incorporates powerful critiques by black, gay and other minority women, who claim their predecessors' theories often have little relevance for them because they are dominated by women who are distinctly white, straight and middle class.

This third generation of feminist theory is populated in part by postmodern feminist thought. Although difficult to contain in one succinct description, postmodern feminism takes its lead from the wider, postmodern intellectual trend, in that it is broadly critical of the preceding, dominant feminist ideology and is characterised by an association with relativism. In this way, postmodern feminism is anxious to reveal the importance of oppression on the basis of a range of factors associated with a woman's gender, and to examine how gender discrimination works in more subtle ways. Martha Minow's 'difference dilemma' theory provides a useful lens through which to understand the way in which postmodern feminist thought might be applied in practice.<sup>55</sup> Minow's theory suggests that neutral strategies (like liberal equality policies, which ignore difference) and strategies which are designed to help women (echoing cultural or radical feminist aims, explicitly acknowledging difference) can result in unwanted consequences if the varied nature of women's experience is not taken into account. In outlining the difference dilemma experienced by women, Minow confirms the purpose of postmodern feminist thought is the importance of acknowledging multiple truths, which themselves arise out of multiple perspectives, rather than simply searching for one, apparently objective, truth or reality. Minow suggests that when the difference dilemma presents itself in this way, it is

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<sup>55</sup> Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Cornell University Press, 1990), Chamallas (n 49) cites Minow in her discussion on the rise of postmodern feminism and the assault on the idea of a 'universal truth'.

helpful to look beyond our own experiences and the views which we hold as a result of the experiences which are personal to us, and to acknowledge that our views are partial, and not necessarily objectively correct or fair. The solution to the challenges arising out of the difference dilemma, according to Minow, is to replace the self as the reference point for judging the needs or actions of others, and to treat the other not as one would like to be treated, but instead, how they want to be treated by listening to their request and deciding whether that request is fair, considering the context of their situation.

This work adopts a broadly postmodern feminist path of enquiry in criticising traditional feminist arguments for ignoring women's partial experience of polygamy, and advocates that one grand feminist theory be abandoned in favour of embracing a new, more relative formula which focuses on the varied lives of women.<sup>56</sup> The feminist line of argument in this research builds on the innovation of Chinkin and Charlesworth in the international legal context. Here, the suggestion by Chinkin and Charlesworth to consider the "illusory necessity" of rules which rest on gendered foundations is taken up and adapted to expose the problem of domestic and international dialogues on polygamy which operate at the expense of less powerful women.<sup>57</sup> In that regard, this work privileges the difference between women, rather than simply focusing on the difference between women and men, to assess the importance of women's diversity in the context of laws and rights.<sup>58</sup>

### 1.6.2 The Utility of Postmodern Feminism

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56 Charlesworth and Chinkin (n 39) 44 quote Carol Smart, *Feminism and the Power of the Law* (Routledge London, 1989) on the benefit of a more relative postmodern feminist theory, that it is better to give up the goal of telling one true story and to embrace the partiality of feminist enquiry.

57 57 Charlesworth and Chinkin (n 39) 21.

58 For an alternative perspective on difference see Martha Fineman, 'Challenging Law, Establishing Differences: The Future of Feminism Legal Scholarship' (1990) 42 Florida Law Review 25, 39 where she presents acknowledging difference as creating disunity which "impedes the aggregation of power necessary for women of all groups to push back the barriers excluding most of us and our experiences, suggesting it is better to find common ground." Fineman discredits the idea of one version of a "gendered existence", while also deriding the "obsession with differences among women", a position which appears curiously at odds with itself.

The framework this postmodern perspective uses is the method of ‘rooting and shifting’.<sup>59</sup> This term describes being rooted in one’s own experience, while also being able to shift to understand the terrain in which others are grounded themselves. Following this method, not all misgivings about polygamy are automatically forgotten or abandoned. Rather, it is simply that one’s own roots and values remain the starting point, while the experiences of other women are not assumed or homogenised according to one’s own norm. The benefit in re-examining legal standards in this way is explained by Diane Otto, an academic widely respected in the field of human rights and gender:

*Women’s citizenship within the global community is both limited to, and conditional upon, their position within the prescribed normative framework. This is contingent upon ‘citizenship’ at the price of women’s diversity and of fundamental global change.*<sup>60</sup>

Otto’s concern with the limitations of global norms and rules resonates particularly strongly in the context of the women considered here, who do not usually exert great power, are often non-citizens in the jurisdictions where they are judged, have limited access to rights, and whose particular experiences are not generally reflected in human rights standards. Just as Minow used her difference dilemma theory to highlight the way that those in power present difference as an unwelcome deviation from the status quo, the intention of this work is to illustrate how a broadly postmodern feminist approach is helpful as a way of developing a more thoughtful and innovative response to women’s different experiences in the context of marriage, forced migration and human rights. In that regard, this work will shift from conventional approaches to polygamy to allow a conception of that difference as a typical occurrence, rather than something which is automatically deviant and unwanted.

To that end, this work brings together scholarship on polygamy from a range of disciplines to suggest that, far from acting in the best interests of women by banning polygamous marriage, laws and human rights standards fail certain categories of women. In the case of refugees, that

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<sup>59</sup> Charlesworth and Chinkin (n 39) 54.

<sup>60</sup> Charlesworth and Chinkin (n 39) 54, quoting Diane Otto, ‘Holding up half the sky, but for whose benefit? A critical analysis of the Fourth World Conference on Women’ 6 Australian Feminist Law Journal (1996).

failure is catastrophic. In building on the work of earlier feminist scholars, this work aims to recognise the complexity of women's experiences of polygamy, and to ask that governing laws and rights better reflect women's unique identities, most especially those of the deviant 'other' women, whose voices are not so often heard when laws and human rights are promulgated. In doing so this work seeks to build on earlier, more traditional feminist projects by pointing out that what is silenced and what is not valued is very often not only that which is feminine, but more particularly, is that which is not favoured by the feminist ruling class, or those women who have long held the balance of power in governing institutions.

### **1.6.3 The Challenge of Relying on Postmodern Feminism**

Because the thrust of postmodern feminism is to question the idea of a universal truth and to develop a new way of seeing difference, some commentators have suggested it is not ordinarily the most obvious tool to employ when lobbying for practical change or legal reform.<sup>61</sup> A theory that might be described as nebulous in its application arguably has no place in the context of suggesting amendments to hard and fast rules which govern many people at one time. With its focus on local narratives and the prioritisation of multiple viewpoints and contextualised judgment, relating postmodern feminist thought to tangible legal solutions combating women's global inequality may not seem plausible.

As argued in this work, however, postmodern feminist theory is capable of practical application, and in a range of contexts too, including the legal treatment of polygamy.<sup>62</sup> The debate on Muslim head coverings, which has so prominently taken place in a range of states across Western Europe and beyond in recent years, provides a useful illustration of this possibility. In this example, formal objections to the veil and the headscarf have forced Muslim women to negotiate their complex, personal identity as Muslims and as individuals who wish

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61 Charlesworth and Chinkin (n 39) 45 refer to the suggestion that postmodern feminism isn't ordinarily concerned with the uncertain path of law reform, rather action at a micro level, and to the suggestion that it is better to be a feminist journalist using this method or inquiry and revelation, than a feminist lawyer. See also Martha Fineman (n 58).

62 There are many feminist theories which might be called 'postmodern' and it is neither within the scope or the intention of this work to canvass them all, regardless of whether they are relevant to the issue which is the focus for this research.

to be free to express all aspects of themselves in the public sphere, something which has been difficult for Western states to accommodate.<sup>63</sup> Using a postmodern feminist approach, the apparently objective truth about these forms of religious dress as symbols of oppression and something which is imposed on women and universally detrimental can be refuted. By moving on from the traditional religious freedom objections to veil and headscarf bans and taking an identity feminist route through this debate, the voices of minority Muslim women in the West are able to be privileged to rebut calls for unconditional prohibition. As a result, complex personal identities can be woven into the discourse of the mainstream, where they have the potential to reveal an experiential bias in the dominant view, adding credibility and legitimacy to the views of women who choose not to subscribe wholesale to the views of the majority.

This work will use postmodern feminist approaches in the context of polygamy to assist in navigating a similar path through various perspectives and experiences of plural marriage. It will acknowledge women's different experiences of polygamy, and offer recommendations for domestic legal change. It will also make suggestions regarding the re-interpretation of international human rights standards, so that those whose practices do not reflect the 'norm' are represented. It will seek to convince the reader of the importance of identifying and understanding the concealed discrimination in unconditional objections to polygamy, unmasking the claim of objectivity which is so often associated with the universal ban on

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63 'Veil' is used in this work to refer to the *niqab*, or face covering, which may also be worn with a *burqa*. The word 'headscarf' refers to the *hijab*. *Leyla Sahin v Turkey* (App no 44774/98) ECHR 10 November 2005, *Dogru v France* (App no 27058/05) ECHR 4 December 2008, *Dahlab v Switzerland* (App no 42393/98) ECHR 15 February 2001 and *Kurtulmus v Turkey* (App no 65500/01) ECHR 24 January 2006 are leading cases involving students and teachers and the right to manifest one's religion by wearing a headscarf in schools and universities, illustrating the consideration of the headscarf according to European rights standards and the application of a margin of appreciation for the state's concerns in banning the headscarf in each case. *Ahmet Arslan and Others v Turkey* (App no 41135/98) ECHR 2010 and *SAS v France* (App no 43835/11) ECHR 1 July 2014 involve complaints against restrictions on wearing religious symbols in public spaces more generally. While in *Ahmet Arslan*, a case involving head covering, a tunic and stick, the court found a violation of Article 9 (freedom to manifest religion), in *SAS* the ECtHR found no violation of Article 8 (right to a private and family life) or Article 9. This case involved a Muslim woman complaining against restrictions on her being allowed to wear a full face veil in public. The Court referred to the state's wide margin of appreciation in such matters. Such cases are modern manifestation of the debate on head covering, going on for more than 20 years across Europe. Early objections to state restrictions were ordinarily based on claims to religious freedom. However, the discourse on Muslim head covering has evolved increasingly to reflect arguments about one's private life, free expression and claims against religious and gender discrimination, in some cases the latter reflecting identity feminist arguments which this work will consider. See also *R (On the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] WLR 719 for this discussion in the English context. where an arguably more tolerant approach is taken.

polygamy as subjective (however well intentioned) and providing a conceptual framework for the re-consideration of polygamy, to avoid unintended, harmful consequences.

The postmodern feminist analysis of polygamy put forward by this work may still be problematic for those, however, who, like prohibitive states and human rights organisations, adopt a strict liberal equality approach to polygamy and consider non-monogamous marriage so inherently unequal it must be antithetical to feminist aims with no possibility for redemption.<sup>64</sup> It is recognised that the suggestions made by this work will certainly not immediately appeal to all feminists. Those who believe unequivocally in the harm of polygamy as inherently detrimental, regardless of the circumstances, will likely also continue to feel an overriding urge to call for its prohibition. This work will argue vigorously, however, that the polygamy paradox highlighted here—in the apparent desire to protect vulnerable women from abuse, and the perverse effect of that protection in making women more, not less, vulnerable—has value for women, for feminist discourse and more broadly, too. As this work will show, the voices of less powerful women are very often barely audible in mainstream feminist or human rights conversations. Abandoned polygamous wives are often not the focus for feminist activists or those working in women's rights in civil society, or anyone else who may influence the content of laws and rights which reject polygamy. In this regard, the emerging 'governance feminism' critique, outlined by Janet Halley and her eminent colleagues, will be used to illustrate the problem of feminists who hold that balance of power, whether it is in legal or human rights institutions.<sup>65</sup> As Halley and others have argued, the impact of governance feminism is that less powerful women may be marginalised so that their story is

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64 Such views have been expressed by various treaty bodies, with responsibility for overseeing human rights standards, including by the Committee overseeing the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, see General Recommendation 21, in particular, discussed in more detail at n 152) and the Human Rights Committee (General Recommendation 28, discussed in detail at n 153) and referred to in government Briefing Papers on the treatment of polygamy in the United Kingdom (Catherine Fairburn, 'Polygamy' (Briefing Paper 05051, House of Commons Library) 6 January 2016 which notes the government does not support plural marriage.

65 The term 'governance feminism' was introduced by Janet Halley in her book, *Split Decisions: How and Why to Take a Break from Feminism* (PUP, 2006). Halley, Prabha Kotiswaran and others have developed the governance feminism critique in 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29 *Harvard Journal of Law and Gender* 335, which questions the role of traditional feminists in setting standards and making laws, their widespread institutionalisation, their firm grip on normative power and their failure to acknowledge it. Such views are also considered in detail in, Janet Halley and others (n 52).

not told. In that connection, this research will investigate what it means for some of these women to be ignored when laws and human rights standards are defined, and whether there is a way to portray a feminist argument which supports a more inclusive approach.

So, while postmodern feminist thinking may be considered by some as too complex and eclectic to have practical significance, and polygamy too inherently unequal and odious ever to be sanctioned, this work will show how identity feminist thinking and a governance feminist analysis of polygamy and its regulation can be put to great use in the long standing feminist tradition of placing women's experiences at the centre of any analysis, to expose and evaluate a hidden bias operating in both laws and human rights.

### **1.7 Outside the Scope of this Work**

While the scope of this research is broad, there are associated topics that are not investigated in detail, either because they are simply not questioned or because they are outside of the range of this investigation. The most important of those are noted below.

The merits of different approaches to domestic polygamy, either in the United Kingdom or elsewhere, are not considered here in detail. Plural marriage is a controversial issue and the increasing numbers of Muslim migrants and refugees in the United Kingdom have made polygamy much more visible, causing concern over its practice and regulation. It is not within the scope of this work, however, to consider every aspect of the practice of polygamy or its regulation and, in seeking to unmask the gendered nature of domestic law and international human rights, this research does not include a thorough examination of polygamy in the domestic sphere. While the historic and global incidence of polygamy is examined in some detail to provide context, with the exception of a brief summary on the domestic practice of polygamy in the United Kingdom as well as an introduction in the following chapter to the distinction between polygamy and other types of multi-party relationships, the focus is very much on the treatment of valid, foreign polygamous marriages in immigration. The marriages focused on here are those where one husband with refugee status has multiple wives and where

no more than one of those spouses may enter and remain in the United Kingdom under family reunification rules.

Despite that, it is acknowledged that the call for recognition of valid polygamous marriages in the immigration sphere bears some relation to the issue of whether or not domestic polygamous marriages ought to be recognised, and the implications of doing so in the domestic sphere. While the consequences of allowing domestic polygamy will not be discussed in detail, it is noted that the benefits and detriments of recognising and regulating, as opposed to banning, polygamy are increasingly being considered.<sup>66</sup> While the relationship between the conclusions drawn here and the law against bigamy will be discussed and research which discusses the recognition and regulation of domestic polygamy will be referred to and relied on throughout this work, this research is confined largely to considering the impact of immigration restrictions on women in polygamous refugee families who are left to fend for themselves, and whether that prohibition on polygamy can be justified when a feminist lens is applied.

In addition, this research does not question the role of the state in legitimising marriage, accepting that it is appropriate for the legislature to distinguish a commitment to marriage from an individual's interest in a less formal relationship. Neither the removal of the institution of marriage nor the removal of the state as the ultimate arbiter in determining the legitimacy of civil marriage, as has been suggested by other commentators, is debated here.<sup>67</sup> Instead, the

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66 Adrienne Davis, 'Regulating Polygamy' (n 9) suggests the use of corporate partnership rules as a framework for managing multiple party marriages; Maura Strassberg, 'The Challenge of Post-Modern Polygamy: Considering Polyamory' (n 7) 439 and 'The Crime of Polygamy' (2003) 12 Temple Political & Civil Rights Law Review 353 where she considers the necessity of managing domestic plural relationships with the rise of polyamory and the necessity of continuing with criminal prohibitions on domestic polygamy; Michele Alexandre, 'Lessons from Islamic Polygamy: A Case for Expanding the American Concept of Surviving Spouse So As to Include De Facto Polygamous Spouses' (2007) 64 Wash & Lee L Rev 1461, where the possibility of accepting polygamy for a distinct purpose is considered; Martha Bailey and Amy Kaufman consider the possibility of domestic polygamy in 'Should Civil Marriage Be Opened Up To Multiple Parties?' (n 8) 1747 as well as more broadly in their book *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy* (Praeger, Santa Barbara 2010); Casey Faucon, 'Marriage Outlaws: Regulating Polygamy in America' (2014) 22 Duke Journal of Gender Law & Policy 1, setting out a process for regulating religious polygamy which reflects the day to day reality of its practice in the USA.

67 For example, Martha Fineman discusses the idea that the state should no longer offer 'marriage' to citizens, but rather, such relationships that might otherwise be called marriage should be regulated by private contracts between the parties in Martha Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (Routledge, 1995) 4-5. The role of the state



limited focus for this work is whether or not the state has erred in its approach to plural marriage in the context of family reunification, and what that means for women and the legitimacy of laws and rights. This research does not seek to comment in detail on whether the state's role, or its definition of marriage and the rights and obligations that flow from it, are more broadly appropriate. In addition, neither does this work question the right of the state more generally to restrict entry for non-citizens. While it is accepted that the denial of movement across frontiers may give rise to human rights abuse in particular circumstances, this work does not share more general views against border management and immigration control *per se*, and while such challenges are noted, they are excluded from the scope of this work.<sup>68</sup>

Finally, the focus for this work is on Islamic polygamy, largely to the exclusion of other types of plural marriage. This is because it is Islamic polygamy that is most likely to be practised by families who seek refuge in the United Kingdom today, and as a result, it is additional wives from Muslim marriages who are most likely to suffer hardship because of limits on family reunification. Accordingly, while some discussion of other types of polygamous marriage is included for comparative purposes and empirical research conducted in other religious communities is relied on where it is relevant, this work is concerned primarily with the treatment of polygamy which is practised by Muslims according to the tenets of the Qur'an.

## 1.8 The Structure of this Work

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in marriage is also discussed in the Islamic context by John Witte in Rex Adhar and Nicholas Aroney (eds) *Shari'a in the West* (OUP, 2010) 284-286, where the author refers to the arguments for polygamy based on religious freedom, their link to political liberalism and the idea of marriage as a pre-political institution. He considers why the state, in the context of the broader social contract, should get exclusive jurisdiction over marriage and concludes "[T]here is evidently nothing ineluctable in liberalism's contractarian logic that requires marital couples to choose the state rather than their own families or their own religious communities to govern their domestic lives-particularly when the state's liberal rules diverge so widely from their own beliefs and practices." While Witte and Fineman's suggestions are undoubtedly interesting, particularly from the point of view of examining the higher incidence of domestic polygamy in the United Kingdom, they are not considered in detail here as the focus is on valid foreign polygamous marriages.

68 For an exposition on such views, see Teresa Hayter *Open Borders: The Case Against Immigration Controls* (Pluto Press, London 2002) and Michael Dummett, *On Immigration and Refugees* (Routledge, Abingdon, 2001).

This chapter has introduced this work. Hereafter, Chapter 2 will provide an overview of the origins and evolution of polygamy before focusing more closely on the issue of harm, and its role in informing policies and laws regarding polygamous marriage. Chapter 2 aims to unpack traditional perspectives on polygamy in preparation for their reconsideration throughout the thesis. Chapter 3 will examine the treatment of polygamy in the United Kingdom, specifically in immigration, exposing inconsistencies in the state's approach and illustrating that the formal response to polygamy in the United Kingdom never has been, and continues not to be, uniform. Chapter 4 will review the approach to polygamy in international human rights standards. Although rights allow the decisions of states to be reviewed according to supra-national rules, the failure of international human rights to offer assistance to additional, excluded wives is highlighted, and the normative basis for that exclusion is questioned. The paradox of polygamy is most clearly illustrated in this analysis of rights, creating a platform for the refreshed, feminist assessment of polygamy which follows. Chapter 5, the final substantive chapter, applies that feminist analysis, addressing directly the suggestion that laws and rights have not considered certain categories of women. Following the interrogation in earlier chapters of the relationship between polygamy and harm, inconsistencies in the domestic treatment of polygamy and the failure of rights to protect additional, polygamous wives, this chapter will offer a feminist re-evaluation of the treatment of polygamy. In addition, this chapter re-casts the role of law and rights, offering suggestions for their reconstruction and postmodern feminist emancipation, by offering tangible law reform. Finally, this work is summarised, and concluded, at Chapter 6.

## **Chapter 2**

### **The Opposition: Polygamy and Harm**

#### **2.1 The Scope of this Chapter**

This chapter explores the common link between polygamy and harm, examining the practice of polygamy as well as traditional objections to it. It sets a foundation for later chapters on human rights and feminist thought which will unpack and reconsider the assumptions about harm and how it is best managed for women and society. The first part begins with an explanation of what polygamous marriage is and how it has evolved. Polygamy and faith are then discussed, with particular emphasis on Islam because it is Muslim polygamy in immigration that provides the prompt for this research. The second part reviews traditional normative approaches to the relationship between plural marriage and harm. The Western case against polygamy is outlined and the suggestion that polygamy cannot be reconciled with the values of the liberal state is explored. In this discussion, the different types of injury thought to be caused by polygamy are considered in four ways. That is, the harm of polygamy to society, the harm to women, and the harm of polygamy as understood through the lenses of human rights and feminist thought. Here, the human rights orthodoxy with regard to polygamy and its close ties with harm are examined, providing the basis for a comprehensive re-evaluation of the relationship between polygamy and human rights in a later chapter. Conventional feminist approaches to polygamy and harm are also explained, laying a foundation for a detailed examination of their efficacy as a method of protecting women, later in this work. This discussion on the privileging of harm and its impact in establishing policy and legal responses to polygamy sets the scene for a brief examination of the global regulation of polygamy in the final part of this chapter, before suggestions are proposed for rethinking the relationship between polygamy and harm.

## 2.2 The Origins and Evolution of Polygamy

### 2.2.1 'Polygamy' Defined

Marriage is a pervasive and socially significant institution with great potential to have a life-altering impact.<sup>69</sup> The validity of marriage is important, not least in part, because a wide range of legal rights and duties are determined by marital status, including legal claims to inheritance, property, social security and rights in immigration. Because so many rights and obligations flow from marriage, ceremonies are regulated so that consent is given freely by those who have capacity to do so. A lot about marriage regulation has recently changed, most notably, with regard to same-sex relationships, which are now formally recognised in many jurisdictions across the globe. In the United Kingdom, the Marriage (Same Sex Couples) Act 2013 legalises same sex marriage in England and Wales, so that gay couples are now able to marry, as well as enter into civil partnerships, illustrating an evolving quality to marriage and family more generally.<sup>70</sup> Attitudes towards family relationships have undoubtedly experienced significant change, having expanded beyond the strictly limited idea of heterosexual marriage between

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69 Adrienne Davis (n 9) 1963, describes marriage as a "... dominant and normative institution with life-altering formal and informal benefits". See also the report from Bailey and others, 'Expanding Recognition of Foreign Marriages: Policy Implications for Canada' in Angela Campbell and others 'Polygamy in Canada: Legal and Social Implications for Women and Children: A collection of Policy Research Reports. Final Report, Status of Women Canada (November, 2005) at 27 where they suggest the fact that (in Canada, and similar jurisdictions like Australia and New Zealand) legal rights are very often extended to couples in de facto marriages and the legal significance of marriage has declined. However, such rights are not extended to non-married, de facto couples in the United Kingdom. See also Cheshire Calhoun 'Who's Afraid of Polygamous Marriage Calhoun, Cheshire, 'Who's Afraid of Polygamous Marriage' (2005) 42 San Diego Law Review 1025, where she lists many practical benefits of marriage including immigration, social security, and other rights.

70 The Civil Partnership Act 2004 first introduced the idea of more formal partnerships for gay couples in the United Kingdom, giving same sex partners the same legal rights as married couples where they enter into a civil partnership. Nearly ten years later, the Marriage (Same Sex Couples) Act 2013 came into force from 29 March 2014. The Act preserves the Canon Law of the Church of England which provides that marriage can be only between a man and a woman, meaning the Church and any individuals working within the Church are not obliged to perform same sex marriage ceremonies and any refusal to do so will not be considered unlawful discrimination under equality provisions which might otherwise apply. For more information on same sex marriage and how it has evolved, objections, acceptance see Stephen Cretney *Same Sex Relationships from Odious Crime to Gay Marriage* (OUP 2006) and Mark Harper *Same Sex Marriage and Civil Partnerships* (Family Law 2014).

two people who share biological children, going some way at least to make the case for English legal adaptability regarding the concept of marriage, where it is required to meet society's changing needs.<sup>71</sup> Where a more inclusive, pluralistic and functional approach to the definition of family is needed, it seems states will recognise additional, important family relationships.<sup>72</sup>

Unlike monogamous marriage, which binds two people to the exclusion of all others, polygamous marriage involves the formalisation of plural relationships with either men or women taking more than one spouse of the opposite sex. Plural marriage is known variously as 'polygyny' and 'polyandry'. 'Polygyny' refers specifically to a man taking more than one female spouse, whereas 'polyandry' describes a woman taking more than one male spouse. Polyandry is comparatively uncommon and polygamy usually takes the form of polygyny. The term 'polygamy' is used in this research to refer to plural marriage by men with other women (i.e. polygynous marriages) as it is the term most commonly used and it is this form of marriage in the Islamic context that this work focuses on. All of these relationships are also distinguishable from 'polyamory' which is a formal commitment to an emotionally intimate, sexual relationship between three or more people, who may or may not be of the same sex and which does not involve marriage, and 'pantagamy' which describes a community where every woman is married to every man and vice versa with sexual access to one another, also called 'polygynandry'.<sup>73</sup>

In the United Kingdom plural marriage may also be considered 'bigamy'. However, bigamy and polygamy are distinguished here, in part because bigamy is recognised as a specific criminal offence in the United Kingdom.<sup>74</sup> Although both polygamy and bigamy involve plural

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71 Nicholas Bala and Rebecca Jaremko Bromwich, 'Context and Inclusivity in Canada's Evolving Definition of the Family', [2002] *International Journal of Law, Policy and the Family* 145, gives an overview of the evolving concept of the family, confirming marriage and family have never been static concepts, although the authors argue that strong reasons continue to exist for not extending legal sanction to polygamous families, in reasoning similar to that presented in the *Bountiful* decision.

72 Bala and Jaremko Bromwich (n 71).

73 Zeitzen *Polygamy: A Cross Cultural Analysis* (Berg 2008) 12. Pantagamy is very rare. Examples include the Oneida Community founded by Congregationalist minister John Humphreys Noyes in 1848, which functioned as a large group marriage until around 1880. A later example is the Kerista Commune in San Francisco where group marriage was practised from 1971 – 1991. This form of marriage is not officially recognised anywhere and according to Zeitzen, the inherent, day to day strains involved in maintaining such a complex and yet intimate relationship make it uncommon.

74 S 10 Offences Against the Person Act 1861.

marriage, religious polygamous marriages are either celebrated outside the United Kingdom in jurisdictions where they are recognised as legally valid, or entered into in the United Kingdom only as unregistered religious marriages. Despite involving multiple partners, these types of marriages do not offend domestic provisions criminalising bigamy in the United Kingdom because they do not involve any attempt to enter into an additional, illegal civil marriage. In addition, whereas bigamy ordinarily involves clear criminality and often deception by one party over another, religious polygamous marriages are more often openly recognised in some way, either by an external state or a religious authority, or both. Finally, while cohabiting with multiple spouses is illegal in some Western states, the Attorney General in the United Kingdom has confirmed that polygamy is not a specific criminal offence in England and Wales.<sup>75</sup>

### 2.2.2 The Evolution of Polygamy

Early polygamous marriages are thought to have related directly to the sexual division of labour and the economic value of women as producers for a household.<sup>76</sup> It is also thought that polygamy may have arisen in part as a function of politics, acting as a way of cementing alliances through plural marriage.<sup>77</sup> Whatever the origins, it has been practised across many faiths and cultures over a long period of time and it continues in different traditions, for economic political, social, biological, and religious reasons.<sup>78</sup> Polygamous marriage has,

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<sup>75</sup> States where cohabitation, or entering into a marriage-like relationship with more than one person simultaneously, is illegal include Canada and the United States of America, where criminal statutes have been tested. In Canada in the *Reference* case (n 5 above) s 293(1) of the Criminal Code of Canada RSC 1985 c C-46, was tested against the Canadian Charter of Rights and Freedoms, with the Court concluding that the criminal prohibition on co-habitation did not breach domestic human rights standards. In the USA, in *Brown v Buhman* (Utah District Court, Central Division) (n 9) the Court struck down the State of Utah's criminal prohibition on cohabitation in the Utah Criminal Code Ann § 76-7-101(1) (2013). However, on appeal, in effect because the criminal prosecution against the Browns was dropped by the state, the Court deemed the Browns no longer had standing to bring their case against the State and the criminal prohibition (*Brown v Buhman* (10th Cir. 2016)(n 9). More recently and more close to home, religious marriage and cohabitation have been outlawed in Germany, see <<http://www.dw.com/en/germany-to-clamp-down-on-religious-polygamy/a-19329733>> last accessed 25 June 2016.

<sup>76</sup> Zeitzen (n 73) 47

<sup>77</sup> Zeitzen (n 73) 47

<sup>78</sup> Zeitzen (n 73) 50 discusses the reasons for the historical practice of polygamy. For additional considerations see Bailey and others (n 69) including more detailed discussions from anthropological and social science perspectives such as 'male compromise' and 'female

however, historically been in decline.<sup>79</sup> The rise of monogamy over polygamy was likely because of practical factors in the first instance, including resource constraints and the limited ability for men to support many wives.<sup>80</sup> The earliest evidence of what has been referred to as ‘socially imposed universal monogamy’—that is, monogamy that is not imposed for practical reasons, but moral disapproval—is evident in ancient Greek and Roman societies.<sup>81</sup> It is among these communities that social rather than functional reasons for prohibiting polygamy can first be observed, resulting in conscious limitations. Part of the motivation for this early regulation of plural marriage is thought to have been a concern for equality, even if that was generally concern for equality among men and their access to wives, rather than between men and women.<sup>82</sup>

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choice’ theories, as well as political, socio-biological and ecological reasons, for polygamous marriage. Bailey also discusses the prominence of polygamy and suggests it is more likely in societies where divorce is difficult (citing Marasinghe 1995: 72-73) and in the modern context, a multiplicity of reasons for choosing polygamy is likely (citing Bretschneider (1995). See also, the useful commentary in Shayna M Sigman ‘Everything Lawyers Know About Polygamy is Wrong’ (2006) 16 Cornell Journal of Law & Public Policy 101 from 144 where she discusses theories for polygamy ranging from demographics and evolutionary biology to economics, politics and religion, delving into whether it is driven by grass roots desire or whether it is ordinarily imposed from the top down and the role played by gender. See also the *Reference* case (n 5) and the evidence of Dr. Walter Scheidel, Chair of the Classics Department at Stanford University which is expanded on in Walter Scheidel, ‘Monogamy and Polygyny in Greece, Rome and World History’, Working Paper, Princeton/Stanford Working Papers in Classics, Version 1.0 June 2008. John Witte’s account of why polygamy ought to be banned, *The Western Case for Monogamy over Polygamy* (CUP, Cambridge 2015) provides a comprehensive historical account of polygamous marriage.

79 Bailey and others (n 69) 2 where they confirm that polygamy was permitted in most parts of the world at one time but that monogamy is now most common in eastern and western Europe, North America, South America, Central America, Australia, New Zealand and large parts of Asia including Japan and China.

80 Zeitzen (n 73) 14, where she confirms the optimum evolutionary strategy for humans is thought to be monogamy when necessary and polygamy when possible. This provides for variation.

81 In his evidence for the *Reference* case Dr. Walter Scheidel addresses the origins, development and consequences of socially imposed monogamy. See also his report on polygyny in world history (n 78).

82 Walter Scheidel on polygyny in world history (n 78) “... [socially imposed universal monogamy] coupled with chattel slavery served to maintain strict (serial) monogamy – ensuring access to legitimate wives for low-resource men and preserving an appearance of sexual equality that chimed with concurrent ideals of judicial and sometimes political equality ...” Because ancient Romans and Greeks considered polygamy a backward custom, individuals were prevented from contracting plural marriages irrespective of their status and power. Witte, John Jr, ‘Why Two in One Flesh? The Western Case for Monogamy over Polygamy’ (2015) 64 Emory Law Journal 1675, at 1696 he suggests that well before the advent of Christianity, the ‘ancient law’ of Rome required monogamous marriages and treated polygamy as ‘nefarious’ and charts the civil law progress of laws banning polygamy for being unnatural, abominable, treacherous. These early objections appear in the modern civil law systems, such as 1794 Prussian Civil Code and the 1810 Napoleonic Code, Bavarian Penal Code 1813, 1871 Criminal Code of the German Empire, Spanish Penal Code 1848 (including for its many Muslim citizens), which expressly prohibited polygamy. Witte says “... these criminal prohibitions remain part of the criminal statutes and

Following the early Greek and Roman transition from polygamy to monogamy, a growing tradition of cultural and religious denunciation was reinforced with the expansion of the Roman Empire.<sup>83</sup> This spread disapproval of polygamy across a wide geographical region, including into Europe. The eventual collapse of the Roman Empire around 500 AD resulted in the re-emerging dominance of cultures and religions that condoned polygamy, including Islam. Subsequent Arab conquests in the Middle East, North Africa and into Spain meant polygamy spread again into areas where earlier it had been prohibited. However, Christianity largely continued to thrive in regions where former Roman rulers had left and Christians continued to uphold early moral objections to polygamy as a cornerstone of biblical guidance on marriage.<sup>84</sup> Given the prevailing importance of Christianity in the West, this meant monogamy, rather than polygamy, has come to be associated with Western custom over time.<sup>85</sup> Because Christian and Western secular norms continued to evolve side by side, this parallel evolution of objections to polygamy in the largely Christian West has made it difficult precisely to determine the origin of modern, and more secular, objections to polygamy and to differentiate those objections from opposition to polygamy arising out of Christian concerns. While early opposition to polygamy in the West might reasonably be associated with religious objections to the practice of plural marriage, Western objections to polygamy are now more accurately linked to the emergence and growing importance of human rights, themselves sometimes described as a modern-day, secular religion.<sup>86</sup> Whereas once it was religion, now a

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codes of most Continental European lands today, though the punishments have lightened and the pace of prosecution has slackened in recent decades...”

83 In the *Reference* case (n 5) paragraph 150, evidence of Dr. Walter Scheidel.

84 Christian religious scripture provides authority for Christian objections to polygamy. Genesis 1 and 2 recount God’s creation of the first man and the first woman with the instruction that the “two shall become one flesh”. The New Testament enhances the earlier Biblical teachings in Matthew 19, Corinthians 7 and Ephesians 5 which all provide further support in Christian teachings for monogamous marriage. See also *Reference* (n 5) paragraph 160 where this is discussed.

85 David Pearl and Werner Menski *Muslim Family Law* (3rd edn Sweet & Maxwell, London 1988) 240 and Zeitzen (n 73) 15, where she confirms monogamy is the dominant family system in most human societies now. Exceptions exist in the Middle East and in some parts of Africa and Asia, where Islam and custom provide the basis for the more widespread legal and moral acceptance of polygamous marriage.

86 Francesca Klug, ‘Human Rights as a Set of Secular Ethics, or Where Does the Responsibilities Bit Fit In?’ (1999) 33:3 *Patterns of Prejudice* 65, where Klug argues that human rights are best thought of as a set of values or secular ethics.



social commitment to gender equality and upholding women's rights is more likely to be relied on in the dialogue objecting to polygamous marriage.

Despite a general downward trend in the practice of polygamy, however, there is evidence of a significant, new development: the increase of polygamy in the West. The numbers of Mormon polygamous marriages are said to be rising, and large numbers of Muslim men and women who now live in places like the United Kingdom, Europe and North America have come from backgrounds where polygamy is accepted, many of them arriving from former colonies as economic migrants or seeking refuge.<sup>87</sup> Despite the strict legal prohibition on plural marriage in the United Kingdom, it is thought as many as 20,000 'underground' Islamic polygamous families may currently reside in Britain with similar numbers in other Western European nations.<sup>88</sup> In addition to Islamic polygamous families, Mormon polygamy continues

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87 On Islamic polygamy, 'What's Wrong with Polygamy' (Asian Network Reports, 2011) <<http://www.bbc.co.uk/programmes/b0153rzs>> (accessed 20 January 2015) discusses the increased incidence of polygamy highlighting the 700 applications to the Islamic Shari'a Council in 2010 citing polygamy as one of the main reasons for women wanting a divorce and using this to confirm the belief that polygamy is being practised in relatively large numbers in Britain. More generally, there is a reported increase in pro polygamy movements. See Michele Alexandre 'Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?' (2007) 18 Hastings Women's Law Journal 3 at where she says that, because of the increased interest in plural relationships generally it is 'imperative' that formal responses to polygamy are reviewed so that a 'woman centric' polygamy is aimed at. Also Elizabeth Emens, 'Monogamy's Law: Compulsory Monogamy and Polyamorous Existence (n 9) 277 in her article on the rise of plural relationships, including polyamory, cites the national organisation 'Loving More' which she says reports a rate of 1,000 hits per day on its website and a circulation of 10,000 for its magazine. Finally, see Pro-polygamy.com, 'Polygamy Rights' Movement Not Re-Defined by Homosexuals, Mar. 31, 2006, available at: <http://www.propolygamy.com/articles.php?news=0040> (accessed November 6, 2006) which highlights the number of pro-polygamy movements in the United States. In addition, there has been recent media coverage, on CNN's Anderson Cooper 360 and Larry King Live for example, showcasing pro-polygamy women advocating for their rights to live the polygamous lifestyle. Whatever the actual rise in numbers, the increasing visibility of polygamy and those who practice it is indisputable.

88 On Mormon polygamy, Duncan, Emily J 'The Positive Effects of Legalizing Polygamy: "Love Is a Many Splendored Thing"' (2008) 15 Duke Journal of Gender Law & Policy 315 where she disputes the suggestion that Mormon polygamy is rare and cultish, saying it is practiced by around 30,000 – 100,000 in North America. She cites Jason D Berkowitz 'Beneath the Veil of Mormonism: Uncovering the Truth about Polygamy in the United States and Canada' 38 U Miami Inter-Am L. Rev. 615, 617 (2006-2007) 332 saying "... the number of polygynists in the United States is climbing. In Utah, the polygynous community grew tenfold over the last fifty years, and polygynists now constitute two percent of the state's population." Duncan says simply of polygamy, it is 'here to stay'. On polygamy in the United Kingdom, see Rachel Stewart 'The Men with Many Wives: the British Muslims who practise polygamy' The Telegraph (London 24 September 2014) <<http://www.telegraph.co.uk/culture/tvandradio/11108763/The-Men-with-Many-Wives-the-British-Muslims-who-practise-polygamy.html>> (accessed 20 January 2015). The article confirms that Shari'a law is used to perform wedding ceremonies which are not recognised as legal marriages. In Europe, Witte (n 78) says there are around a million people practising polygamy in Europe, although only estimates can be made because no exact numbers are available, where he cites Veronica Federico, Europe

to be practiced in North America, and conspicuously enough to prompt direct legal interest, with estimates of around 30,000 to 100,000 polygamous families in North America, and climbing.<sup>89</sup> The steady rise of polygamy and its increasing visibility in various forms in the West has prompted a renewed interest in both its practice and its regulation across Western states.

## 2.3 Polygamy in Islam

At various times in human history, polygamy has been practised by followers of most of the world's major religious groups, including Muslims, Hindus, Buddhists, Mormons, Jews, Christians and native cultural and faith groups.<sup>90</sup> While polygamy continues to be practised according to more than just one religious or cultural tradition, because of the current geographical context of conflict at the time of writing and the movement of migrants and refugees, very often it is Muslim families who seek to enter and remain in the United Kingdom, and it is additional Muslim wives who are likely to be prevented from taking advantage of family reunification provisions.

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Facing Polygamy: Italy, France and the UK Accept the Challenge of Immigration (presented at the IACL IX World Congress, Oslo, June 16–20, 2014) (unpublished manuscript), available at <https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws6/w6-federico.pdf> (Federico notes there are thousands of cases of bigamy and polygamy in France, the United Kingdom, and Italy).

<sup>89</sup> See *Brown and Bountiful* (n 78 and n 5). For a comprehensive historical analysis and more general discussion of the response to polygamy in the United States, see Stephanie Forbes 'Why Have Just One?: An Evaluation of the Anti-Polygamy Laws Under the Establishment Clause' (2003) 39 *Houston Law Review* 1517.

<sup>90</sup> In Judaism polygamy was practised by ancient Hebrews, and also in some cases, by Jews in Europe into the Middle Ages. Today, polygamy is not ordinarily practised in Judaism, and most Jews live according to state laws which prohibit polygamy. The Bible provides some evidence of polygamy being practised in Christianity by Lamech (the grandson of Adam and Eve), Abraham, David and Solomon. It was also practiced by small groups of Christians in the late medieval period and has been tolerated from time to time among Christian communities throughout history. For more on Christian and Jewish polygamy see Zeitzon (n 73) and Cheshire Calhoun (n 69) 1028. However, polygamy has never really be considered wholly legitimate for most Christians and where Christians exist in large numbers, state laws have ordinarily banned polygamy outright. Generally, among Christians today, polygamy is widely considered unacceptable, although there remain a few minor exceptions, such as the Christian communities in Cameroon. As already discussed, related to the Christian tradition, Mormons, have historically taken a different view of polygamy. Originally widely practised and encouraged it is now banned and criminalised throughout the North American region where Mormons are most prominent, although polygamous marriages continue commonly to be entered into, albeit only by members of fundamentalist Mormon communities. Polygamy is sometimes also practised by members of the Hindu, Buddhist and cultural traditions.

The Qur'an is the core basis for the tenets of Islamic practice and worship, following its revelation near Mecca to the Prophet Mohammed over many years in the early part of the seventh century.<sup>91</sup> The Qur'anic revelations came to the Prophet at a time of great unrest in the region and the Qur'an is said to have urged a pathway through the 'spiritual malaise' and injustice that had characterised the behaviour of earlier pagan, Arabian tribes and their traditions by recommending a single God and community, governed by justice and equity.<sup>92</sup> All aspects of Muslim life are potentially holy and therefore liable to assessment according to the Qur'an. The Qur'an instructs Muslims to build their communities by prioritising compassion and social justice, virtues said to be crucial to Islamic ideals.<sup>93</sup> In particular, the lives of women were said to have been of great concern to the Prophet Mohammed and, considered in context, it is likely the Qur'an sought the emancipation of women from their position of relative oppression under early Arabian practices.<sup>94</sup> For the first time, the Qur'an offered women protection and rights, including the right to inheritance and divorce, doing so long before women in the West were granted recognition and protection inside the framework of marriage.<sup>95</sup> While Islam has been criticised for advocating veiling and segregation for women, when it is read with some awareness of the limitations of its time, it seems the revelations received by the Prophet anticipated that women in Islam would play a full part in community life.

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91 Armstrong, Karen *Islam; A Short History* (Phoenix Press London, 2006)

92 Armstrong, (n 91) 7.

93 Armstrong, (n 91) 5.

94 Armstrong, (n 91) 14. See also L Beck and N Keddie (eds) *Women in the Muslim World* HUP (1978) 25, where they make the point that customs often associated with Islam existed in the Middle East long before Islam was born, including veiling, polygamy or other practises some often associate with Islam and the domination of men over women. In the context of polygamy, Islam might therefore be seen as attempt to regulate its on-going practice for the benefit of women rather than a starting point which introduces and proscribes the practice of plural marriage by men. See also Abdullahi An-Naim *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse University Press, 1990) 66.

95 Under the common law doctrine of 'coverture' women lost all legal personality on entering monogamous marriage, in line with the wife's legal status as 'feme covert'. The process of making marriage more equal began in the late nineteenth century, starting with the Married Women's Property Act 1882, although many, although it was only the start of a long struggle for women in monogamous marriage to achieve full equality. For example, abolition of immunity for rape within marriage only a full century later under s 142 Criminal Justice and Public Order Act 1994, extended in the Sexual Offences Act 2003.

Marriage is central to the Muslim way of life.<sup>96</sup> Ordinarily, it is the only way Muslim men and women can have intimate contact and it is considered important not only in terms of relationships within families, but also between families as well.<sup>97</sup> At the time of the Qur'anic revelations polygamous marriage was practised on a widespread basis, including by Mohammed himself. Although it is not obligatory for Muslim men to practice polygamy, it is said to be permitted by the following verse:

*Sura 4:3*

*And if you fear that you cannot act equitably towards orphans, marry such women as seem good to you, two and three and four; but if you fear that you will not do justice between them, then marry only one or what your right hands possess: this is more proper that you may not deviate from the right course.*<sup>98</sup>

There is much discussion and disagreement over the true nature of approval for polygamy in the Qur'an and, like other religious or legal texts, it is possible for multiple interpretations to arise.<sup>99</sup> Despite that, in practice, the generally accepted view in the Islamic tradition today is that the Qur'an permits polygamy under certain conditions, provided the number of wives a

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96 Manazir Ahsan 'The Muslim Family in Britain' in Michael King (ed) *God's law versus State Law: The Constructions of an Islamic Identity in Western Europe* (Grey Seal Books, 1995) 22.

97 Ahsan (n 96) 24. Marriage is described in the Qur'an as a strong and binding contract ('*mithaqan ghaliza*'). It is possible for Islamic marriages to be dissolved by either spouse, albeit in more limited circumstances for women. Women can divorce in special circumstances ("*khula*"), and if a woman has been delegated the right in the marriage contract ("*tafwid*"), where her husband is impotent ("*innin*"), or where he fails to maintain her or deserts her. Despite these limitations, Ahsan suggests Islamic law encourages Muslim husbands to be good and generous to wives in divorce (see Qur'an Sura 4:20).

98 David Pearl and Werner Menski, *Muslim Family Law* (3rd edn Sweet & Maxwell, London 1988) 240. A fifth wife may also be accommodated, even if not in exactly the same way as the four ordinary wives in Islam. This is a '*Fasid*' marriage. See also Sura 23:32. "Marry those among you who are single, or the virtuous ones among yourselves, male or female: if they are in poverty, Allah will give them means out of His grace: for Allah encompasseth all, and he knoweth all things" which is sometimes also used together with Sura 4:3.

99 For an in depth discussion on Islamic jurisprudence and the possibility of different manifestations of polygamy, including the potential for polygamy to be reformed, see Michele Alexandre 'So Long a Letter: Toward a Women-Centric System of Islamic Polygamy' 1 (2006) *All in the Family—Islam and Human Rights*, Atlanta Law School, Georgia 3,4 March 1, where she confirms the potential for alternative interpretations of Islamic texts, offering ideas for reform which are based on earlier analyses of Islamic law's treatment of women so far, as well as women's experience of Muslim polygamy.

husband has at any one time is expressly restricted to four.<sup>100</sup> It is also widely accepted that the Qur'an requires fair treatment on the part of a husband vis-à-vis each of his wives. The exact nature of that obligation of fairness continues to be debated, but it is a requirement that bears some relationship to the link between polygamy and the potential for it to cause misery and hardship to multiple wives. Rightly or wrongly, in order to avoid harm arising for women out of polygamous marriage, the dominant view among Muslims today appears to be that financial rather than emotional equality among wives is generally enough.<sup>101</sup>

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100 Kecia Ali, 'Marriage, Family and Sexual Ethics' in Rippin, Andrew (ed) *The Islamic World* (Routledge, 2008) 611, at 620 has created a typology of traditional views relied on to justify polygamy in Islam, referring to them in three broad categories. Javaid Rehman 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq' (2007) 21 *International Journal of Law Policy and the Family* 108 argues "[G]iven the changes in the social, political and legal environment, the continuation of the practice of polygamy demands a substantial explanation. Many of its historic reasons within the Islamic world for justifying polygamous marriages (for example, the surplus of women and loss of men through battles and armed conflict) are no longer tenable (2007: 115)." See also Beck and Keddie (n 94) who talk about the 'legitimacy of marrying up to four wives' being in the Qur'an, and Ahsan (n 96) where the ability to marry up to four wives is described as a permission, not a recommendation. See Aqil Ahmad, *Mohammedan Law* (23rd Edition Central Law Agency, Allahabad, India, 2010) 143; any passages in the Qur'an which appear to provide support for the practice of polygamy ought to be read and interpreted in a qualified way and restricted so that Sura 4:3 merely confirms monogamy as the norm, while allowing for the possibility that polygamy is permitted in very limited circumstances.

101 Pearl and Menski (n 98) 239. There are many different opinions as to how the requirement of justice and fairness might be satisfied so as to meet the requirements of Sura 4:3; rather like the references to polygamy in the Qur'an, it is possible for the obligation to treat wives fairly to be interpreted in more than one way, perhaps by the equal division of goods and financial resources, or equal distribution not only of practical resources, but also of intimacy, sexual relations and affection. However, this more onerous obligation in respect of fairness in polygamous marriage is not universally accepted. Islamic objections to promiscuity in the West also play their part in the dialogue on approval for polygamous marriage. Because extra marital relations are tolerated in Western societies, or at least very much more so than among Islamic communities, the suggestion is that monogamy is not actually a reality in practice for many Western or Christian men. Supporters of polygamy in Islam make the point that it is a complete fiction to assume Western and Christian men are monogamous, the corollary being that laws which ban polygamy and uphold monogamy as the only model for familial relationships are a misleading and dishonest attempt to hide the true nature of intimate relationships, masking the practical reality. The lack of tolerance towards meaningful, open and committed plural relationships in the West seems both hypocritical and morally questionable. For more on this see Ahsan (n 96) 26. Similar arguments have also been used by Mormons in their fight to have polygamy legally recognised in the United States. Jonathan Turley, who acted for the Browns in their case against the criminalisation of polygamy in Utah, has argued that the prohibition on polygamy is a unjustifiable limit on sexual freedom and it is hypocrisy, because we don't outlaw informal affairs ('Polygamy Laws Expose Our Own Hypocrisy' *USA Today* 3 October 2004 <[http://usatoday30.usatoday.com/news/opinion/columnist/2004-10-03-turley\\_x.htm](http://usatoday30.usatoday.com/news/opinion/columnist/2004-10-03-turley_x.htm)> accessed 11 March 2016). Using due process privacy protections and the ruling in the US Supreme Court overturning Texas sodomy laws, *Lawrence v Texas* 539 US 558 (2003), establishing a right to privacy extending to private consensual acts, Mormons have argued that if one can engage in a sexual act or relationship with any number of partners, it can't be fair that a person can live with and have as many children with any number of partners as long as they do not marry, when they make a commitment as spouses, they are jailed. This argument had previously been dismissed on the basis the state has an interest in practice of monogamous marriage. In the first instance, the Court in *Brown* subsequently disagreed with that and struck down the criminal prohibition on plural cohabitation.

## 2.4 The Problem of Polygamy and Harm

Whatever the debate within Islamic discourse, given the Qur'an refers expressly to plural marriage, it is likely some Muslim women will have a strong wish to remain faithful to their religion and be open to polygamy, even if others will continue to have doubts about whether being one of multiple wives is right for them.<sup>102</sup> This, together with the rise of Islamic polygamy in Western Europe and the increasing visibility of polygamy more generally, suggests there is merit in re-examining traditional objections to polygamous marriage, which range from conservative and religious opponents whose traditional sense of family it offends, to women's rights activists and feminists who rely on concerns about exploitation and subjugation.

The traditional, Western view of polygamy and its relationship with harm is expressed succinctly by Professor John Witte in material that began as an expert opinion for the Attorney General of Canada in the *Bountiful* case and which developed into a substantial work presenting the Western case against polygamy.<sup>103</sup> Witte takes the view that the many historical arguments

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102 Lori Beaman discusses the range of arguments in 'Is Polygamy Inherently Harmful' in Calder and Beaman (eds) *Polygamy's Rights and Wrongs* (n 6) 3.

103 Witte, (n 78). In the *Reference* case, the Chief Justice of the British Columbian Supreme Court found polygamy harmful to society as it engenders higher rates of poverty and institutionalises gender inequality (paragraph 13). In a case where the Attorney General asked the Court to rule on whether s 293 of the Canadian Criminal Code criminalising polygamy was inconsistent with the Canadian Charter of Fundamental Rights and Freedoms, the Court ruled the criminal prohibition on polygamy does offend the Charter but is saved by s 1 because it is a restriction which is demonstrably justified in a free and democratic society. Justice Bauman also concluded the criminal code breaches s 7 of the Charter (relating to the liberty interest of children between 12 and 17 who are married into polygamy) and that it be read down so that such children are not prosecuted. Finally, the Court concluded s 293 does not offend the Charter provisions relating to freedom of expression (s 2(b)) or freedom of association (section 2(d)). Justice Bauman also confirmed s 15 of the Charter, relating to marital status, is not breached by the s 293 prohibition on polygamy because there is no religions or marital status discrimination. The amicus curiae appointed to argue against the criminal code in response to the Attorney General's referral has indicated the decision will not be appealed. The decision might have been appealed by either party within the federal system – for example, the state Attorney General together with the federal Attorney General might have expressed an interest in appealing to a higher court for finality and clarity, but they did not do so. Accordingly, for now, the ruling has application only in British Columbia. In addition, for useful summaries, see Angela Campbell 'Bountiful's Plural Marriages [2010] *International Journal of Law in Context* 343, Linda McKay-Panos, 'British Columbia Supreme Court Releases Reference Decision on Polygamy – One Alberta Connection' February 15, 2012 and BJ Wray and others, (2015) 64 *Emory Law Journal* 'The Most Comprehensive Judicial Record Ever Produced: The Polygamy Reference' 1877.

employed against polygamy across a wide variety of traditions over an extended period of time remain convincing today. As a result, he is unequivocally in favour of a polygamy ban, saying:

*... the most enduring argument in the Western tradition is that polygamy is too often the cause, consequence or corollary of harm, especially to the most vulnerable populations.*<sup>104</sup>

However, as Witte himself acknowledges, the legal approach to polygamy has not been consistent over time and is reasonable to question whether the case he makes against polygamy continues to be as strong in a postmodern, globalising world.<sup>105</sup> In carrying out that investigation this part divides the broad collection of harms often associated with polygamy into four main categories: its impact on society, its impact on individuals (particularly women and children), its inconsistency with human rights and its inconsistency with feminist ideals. Here, the arguments against polygamy which are based on harm are divided up so that they may more clearly be understood, even if it is also accepted that each category will experience some overlap with the other.

#### **2.4.1 Harm in Western Society**

This work offers a further typology to assist in developing a clear understanding of the many factors often associated with societal harm. This includes, concern over morality, concern over inconsistency with liberal aims and values and concern over a general culture of violence, injustice and community harm which is encouraged by a permissive attitude to polygamy, each of which will now be examined.

Beginning with the idea of morality, it is this which has perhaps most persistently dominated the discussion on harm and polygamy in the West, where academics and judges have suggested

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<sup>104</sup> Witte, (n 78) 457.

<sup>105</sup> Witte, (n 78) 2, 443.

that polygamy has a moral equivalence with slavery, incest and bestiality.<sup>106</sup> In making his own broad, Western case against polygamy, Witte has aligned his critique with moral objection, at least in part. In so doing, he has focussed heavily on historic examples of the harm caused by polygamy, to men, women and children, over a long period of time, stretching from Greco-Roman Laws outlawing polygamy through to the modern day American case against plural marriage, arguing that the association between polygamy and harm is long and enduring, such that monogamy surely must be preferred.<sup>107</sup> Tipping his hat to the association between polygamy and immorality, Witte refers to the fact that, for a long time, polygamy has not unreasonably been considered something ‘bad’ in itself, rather like cannibalism. This suggestion echoes conservative notions of morality in expressing his view there can be no good arising from a practice which is inherently damaging. Such views have featured prominently in early objections to polygamy in case law, both in North America<sup>108</sup> and in the United Kingdom<sup>109</sup> where polygamy was variously found to be “injurious to public morals” and an “odious” practice, comments which conservative commentators continue to rely on today, locating their criticism of polygamy in the same morality objections made in these early cases. In the modern context in particular, the apparent association between immorality and polygamy has commonly been used as a rhetorical tool in the discourse on same sex marriage, to ballast conservative objections to the formalisation of same sex relationships.<sup>110</sup> One of the

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106 Sigman, (n 78) 101 refers to the comparison with its ‘twin’ slavery. She also refers to the judgment in *Lawrence* which overturns a ban on same-sex intimacy, and where the late Justice Scalia dissented, warning against the lifting of the ban because doing so would put the ban on polygamy at risk.

107 Witte (n 78) 458 provides a range of reasons which support this argument, including a study by McDermott, Rose and Cowden Jonathan later published as ‘Polygyny and Violence Against Women’ (2015) 64 Emory Law Journal 1767. McDermott’s also provided evidence to this effect in the Reference case (paragraph 580).

108 *Reynolds v United States* 98 US 145 (1878) 164. The Court in *Reynolds* backed its reasoning up by ascribing polygamy an African and Asiatic heritage, making clear it was thought to be odious and foreign to Western civilisation, in particular. The attempt by Mormons to introduce a non-Western practice into Western society was viewed negatively. Its concern with polygamy being, more generally, “injurious to public morals” was not supported with evidence and implied the potential harm to public morality did not require any further explanation.

109 *Hyde v Hyde* (1865-69) LR 1 P&D, where polygamy was described as injurious to public morals.

110 For more insight into the relationship between same sex and polygamous marriage and their respective appeals for recognition, see Calhoun (n 69), where she says challenges to same sex marriage are most effectively met by challenging assumptions about polygamy. Davis (n 9) also refers to this at 1957 where she notes the same sex marriage debate is often appropriated by polygamy’s proponents, who like to present polygamy as another civil rights battle and just another ‘alternative’ lifestyle, which should be tolerated (the ‘alternative lifestyle defence’), using the same language as gay rights activists, about ‘coming out’ and ‘closeted [polygamous] families’. (Although Davis herself distinguishes the argument for polygamy from the fight for same sex marriage saying



most striking examples of this is the 2006 decision of the United States Supreme Court in *Lawrence v Texas* where the Court was asked to overturn laws against sodomy, which it did but not without strongly condemning the immorality of plural marriage, in dissent. In this case, it was the familiar, conservative voice of (the now, late) Justice Scalia reminding us of the “massive disruption of the current social order” which would ensue if the laws against sodomy were overturned, linking directly that disruption to polygamous marriage among other objectionable practices.<sup>111</sup> In fact, Justice Scalia warned against widespread social unrest precisely because in his view the laws against plural marriage (as well as incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity) would be sustainable in the future only if sodomy remained outlawed, maintaining the court’s power to ban certain practices based on their potential harm to society.<sup>112</sup>

Concern over morality has been prominent, and the use of the ‘moral slippery slope’ argument against polygamy is still common today where same-sex marriage is discussed. Often more audible in the modern discussion on polygamy and harm in the West, however, is an argument which is diametrically opposed to that rooted in concern for conservative moral values: that is, the presentation of polygamy as a threat to liberal equality.<sup>113</sup> Turning again to Witte’s analysis of the harmful nature of polygamy, while he cites morality as a concern in making his

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they are fundamentality different, in particular because polygamy involves a unique multiplicity.) Similarly, the website propolygamy.com describes polygamy as the ‘next civil rights battle’ (accessed 11 March 2016). In David L Chambers ‘Polygamy and Same Sex Marriage’ 26 Hofstra L. Rev. 53 1997-1998, the author discusses the Defence of Marriage Act 1996 (allowing states not to recognise same sex marriages performed in other states) and analogises the arguments on federal intervention to prohibit polygamy a century ago and the federal intervention effectively allowing states to continue to prohibit same sex marriage.

111 This was not the first time Justice Scalia has relied on the link between polygamy and another practice he considers odious in a dissenting judgment. In 1996 Justice Scalia dissented from the majority decision to invalidate a statute which would have prevented formal banning of discrimination on the ground of sexual orientation, saying “the court’s disposition today suggests that ... polygamy must be permitted ... unless of course, polygamists for some reason have fewer constitutional rights than homosexuals; *Romer v Evans* 517 US 620 (1996).

112 Conservative politicians also picked up where Justice Scalia left off. Rick Santorum, a Republican Senator, is quoted as responding to the judgment by saying, “[i]f the Supreme Court says that you have the right to consensual (gay) sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything” in Sean Loughlin, ‘Santorum Under Fire for Comments on Homosexuality’ <[www.cnn.com/2003/ALLPOLITICS/04/22/santorum.gays/](http://www.cnn.com/2003/ALLPOLITICS/04/22/santorum.gays/)> (April 22, 2003) (accessed 11 March 2016) (quoting interview by Associated Press with Senator Rick Santorum, April 21, 2003).

113 For a detailed summary of harm in this context see Sigman (n 78) 168, where she discusses the harm to society and wives and lists the human rights and feminist aims it offends.

case against polygamy in the West, he also relies heavily on liberal political dogma. According to this reasoning, polygamy is harmful in the Western legal tradition because it is at odds with the principles of liberty and equality.<sup>114</sup> In this regard, Witte suggests the laws against polygamy ought not to be seen as simple “prudential prophylactics against harm.” Rather, they are symbolic of something bigger, something with a deep, normative foundation and a broad, practical reach. Applying a liberal, equality analysis, monogamous marriage is seen as representative of a certain vision of the ‘good society’ and the ‘good life’, which is also why most Western and some other states encourage their citizens towards a dyadic model of marriage. By extension, where the state prohibits plural marriage, it is discouraging and warning against a form of marriage that is at odds with the fundamental values that Western society is said to hold dear. For this reason, according to Witte at least, the Western legal tradition ought simply to close the door on any suggestion it must recognise polygamous marriages. Because it cannot be reconciled with Western values, the West must simply say ‘no’ to polygamy, whatever the consequences.<sup>115</sup>

Writing with similar strength of disapproval for polygamy Susan Moller Okin has also expressed liberal equality concerns in her essay on the tension between minority group rights and feminist aims, expressing the view that polygamy is illustrative of a gap between liberal aims and the practices of minority cultures in the West.<sup>116</sup> Moller Okin suggests the West has departed from its more patriarchal past, and that other cultures must also shed practices that are at odds with liberal equality goals like non-discrimination. She is unforgiving in her thesis; where any minority culture risks extinction as a result of prohibitions on practices that, in her view, are discriminatory, so be it. The possibility of this outcome is, in fact, to be welcomed,

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114 Bailey and others (n 69) at 4 cites research which says 64% of monogamous societies compared with 25% of polygamous societies have liberal democracies.

115 Nicholas Bala and Rebecca Jaremko Bromwich, (n 71) 145 supports this suggestion saying, “[t]he historical record shows that monogamy, like private property, is indispensable to constitutional democracy ... Those regions of the world where polygamy is still practised are precisely the areas where constitutional democracy has made the least progress.” Although he also agrees lack of legal recognition of relationships can marginalise women and children and perpetuate the conditions which have made their exploitation possible.

116 Susan Moller Okin ‘Is Multiculturalism Bad for Women in Cohen, Joshua, Nussbaum, Martha and Howard, Mathew (eds) *Is Multiculturalism Bad for Women? Susan Moller Okin with Respondents* (PUP, 1999) 15.

so important are liberal equality aims.<sup>117</sup> Moller Okin's views have widely been criticised for effectively creating their own self-supporting, circular theory, by arguing that any given practice must be grounded in liberal values and truths otherwise, according to the same universal truth, it becomes justifiable not to tolerate the practice concerned. In this way, Moller Okin's concerns might easily be accused of perpetuating a modern form of colonialising paternalism, albeit that they are expressed behind a cloak of informed tolerance, a claim that will be explored in some detail in the chapters analysing modern human rights and feminist critiques of polygamy, later in this work. Whatever the criticism and however strong, though, Moller Okin's message reflects the common and unambiguous support for liberal objections to polygamous marriage in the West. Where a minority group practice is deemed harmful, culture cannot trump women's rights.<sup>118</sup> In the case of polygamy, according to Moller Okin's thesis, polygamy's universal prohibition is required.

The third concern in this typology of harm to society is a more general occupation with polygamy and its proclivity to cause harm to the community. This concern is anchored in liberal equality considerations, but tends to focus on the practical outcomes that threat to liberal values actually poses.<sup>119</sup> Elevating the role of the family in the wellbeing of the community and state, Professor Maura Strassberg addresses community harm by engaging with Justice Scalia's 'slippery slope' concerns, expressed in the *Lawrence* decision. Here, Strassberg considers whether Justice Scalia is right, and the extension of marriage to same sex

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117 Susan Moller Okin (n 116) 24. Moller Okin does acknowledge that women should be involved and represented in any discussion on the group's rights, but this is buried in her own analysis of what harm is and without any meaningful expression of her understanding of 'patriarchal' practices, like polygamy, from a Muslim woman's point of view.

118 Susan Moller Okin (n 116) 11.

119 Strassberg has written extensively in the context of ethics and sexuality including the construction by conservative commentators of arguments against same sex marriage on the basis of the potential for the definition of marriage to extend to polygamy. See Maura Strassberg, 'Distinctions of Form or Substance: Monogamy, Polygamy and Same Sex Marriage' (n 7) 1501. In her analysis of the use of arguments against polygamy in this context, Strassberg has also written more generally about polygamy, saying "[P]olygyny not only fails to produce critical building blocks of liberal democracy, such as autonomous individuality and social existence, but promotes a despotic state populated by subjects rather than citizens." Maura Strassberg 'The Crime of Polygamy' (n 66) 353. See Keith O'Brien, 'We cannot afford to indulge this madness: Cardinal Keith O'Brien, Britain's most senior Catholic sets out his opposition to the Government's plans to legalise gay marriage' *The Daily Telegraph* (3 March 2012) <<http://www.telegraph.co.uk/comment/9121424/We-cannot-afford-to-indulge-this-madness.html>> accessed 13 April 2017, for a similarly articulated local objection. See also Jonathan Porter, 'L'amour for Four: Polygyny, Polyamory and the State's Compelling Economic Interest in Normative Monogamy' (2015) 64 Emory Law Journal 2093.

couples would likely undermine liberal arguments against polygamy and encourage it legitimately to be practised in Western societies.<sup>120</sup> She concludes that any attempt to justify polygamy on the basis of the extension of the institution of marriage to same sex couples would be misguided.<sup>121</sup> In her conclusion, same sex marriage is valuable and consistent with the aims of a modern liberal state and polygamous marriage simply is not. Prioritising the family as an essential part of the institutional structure of the liberal state and noting the importance of a free individual to the idea of a liberal democracy, Strassberg defines polygamy as something which will discourage individual thought and liberty and encourage the idea of a highly hierarchical community with a despotic model for statehood. Although her views are generally limited to the fundamentalist Mormon context, the main thrust of Strassberg's work is in conveying the idea that, even at a time when the very idea of marriage is evolving and expanding, polygamy is inconsistent with the notion of a good society.<sup>122</sup> Where the preservation of the liberal state is important to the notion of a good life, the preservation of monogamous families is apparently the key, while polygamy poses an unacceptable threat to that aim.<sup>123</sup>

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120 Maura Strassberg, *Distinctions of Form or Substance* (n 7), Jaime M Gher, 'Polygamy and Same-Sex Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement' (2008) 14 Wm & Mary J Women & L 559 also addresses directly the slippery slope 'accusation' that permitting same-sex marriage will inevitably lead to the legalisation of polygamy, arguing for a more nuanced idea of marriage in its various forms, trying to walk a steady line between distancing same sex marriage arguments from polygamy so as not to dilute the support it has worked so hard to gain, while at the same time, discouraging any attempt to malign polygamy as relentlessly barbaric and bad, encouraging respect for diversity in the context of any fight for marriage equality. The article by Bala and Bromwich (n 71) also discusses the extension of the idea of 'family' in the Canadian context, including the Canadian Law Commission's suggestion that a broader range of 'close personal adult relationships' should legally be recognised, although the article concludes by reiterating strong arguments for not recognising polygamy.

121 Maura Strassberg, 'Distinctions of Form or Substance' (n 7). Strassberg roots her analysis in Hegelian legal theory, and justifies doing so by reference to early American case law on polygamy (primarily, *Reynolds v United States* (n 108) which expresses concern that allowing plural marriage could undermine the liberal foundation of the United States and its constitutional prioritisation of democracy and freedom.

122 Strassberg discusses various psychological, sociological and political impacts of polygamy which were substantial and pressing, set out in the *Reference* decision, and justifying criminalisation in her view in 'Scrutinizing Polygamy' (n 122) at 1818.

123 Strassberg also contrasts the practice of polygamy to that of the emerging practice of polyamory or polyfidelity, to further illustrate her point, highlighting distinctions between each practice on the basis of individual liberty and harm. Strassberg concludes that polyamory is not at odds with the liberal state, applying a Hegelian function analysis of marriage to come to the view that it does not pose a political threat, and nor does it evoke the same concern for various harms as the more damaging practice of polygamy (Maura Strassberg, 'The Challenge of Post-Modern Polygamy: Considering Polyamory' (n 7) 433. Strassberg has argued elsewhere that the criminalisation of fundamentalist polygamy can be justified precisely because of the link she makes between plural marriage and its threat to the state, as well as its link to individual harm (Strassberg, 'The Crime of Polygamy' (n 66).

The idea of polygamy posing a direct risk to the community is discussed in detail in the work of Rose McDermott, where she gathers a multifaceted collection of specific, detrimental effects of polygamy on society.<sup>124</sup> McDermott is unforgiving in her analysis of polygamy as a practice which can be linked to a wide range of very definite harms, including a decrease in civil rights and an increase in insecurity and weapons procurement, with potentially grave physical, political and economic consequences for those communities in which it is practised.<sup>125</sup> McDermott also documents an apparent increase in morbidity, a decrease in education for women and girls, worse economic prospects (particularly for women) and the higher risk of all members of society being subjected to crime; a wide range of harms indeed. It is vital to note, however, McDermott acknowledges that her results do not consider variables like religious affiliation or political systems and their ability to mitigate the negative effects of polygamy on society. Despite that, she remains clear in her condemnation of plural marriage because of its potential for harm, expressing the view that the consistency and strength of her findings are highly suggestive of a culture of violence and injustice being encouraged by polygamous marriage.<sup>126</sup>

Although via different paths, each of the views expressed above reaches the same conclusion about polygamy and harm to society, illustrating the predominant view of polygamy in the West as something which is manifestly objectionable where the aim is to prevent community harm and ensure liberal equality. While the strength of these arguments will be assessed in later chapters with regard to feminist and human rights objections, it is suffice to say that the description of the evil of polygamy, its risk to liberal goals and its propensity to cause harm to the foundation of Western society is representative of the conventional approach in Western democracies.<sup>127</sup> While the reasoning and the justification for holding the view of polygamy as

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124 McDermott, Rose and Cowden Jonathan 'Polygyny and Violence Against Women' (2015) 64 Emory Law Journal 1767, 1809.

125 McDermott (n 124) 1809.

126 McDermott (n 124) 1810.

127 On the approach to Muslim personal status laws more broadly, as they relate to matters other than polygamy (for example, marriage and divorce, inheritance, and other family matters) see Pascale Fournier 'The Reception of Muslim Family Laws in Western Liberal States' <<http://www.wluml.org/node/504>> (December 2005) accessed 27 July 16 regarding Shari'a and its reception in Britain and other European states, where Fournier charts the extent which courts have rejected or recognised Muslim personal laws more broadly.

something which is harmful to and incompatible with the liberal state may vary, there is no doubt the West has a long history of unease about polygamy. While such objections on the basis of harm to society may arguably amount to the imposition of a ‘compulsive liberalism’, not unlike the legal moralism espoused by Devlin in his debate with HLA Hart on harm, the moralistic and liberal equality concerns about the impact of polygamy on society remain abiding and continue to run deep, having formed part of modern arguments which have convinced courts not to de-criminalise its practice for fear of making the world a generally less safe place.<sup>128</sup>

#### 2.4.2 Harm to Women

While concerns about polygamy are often grounded in moral objections and concern for its lack of coherence with Western, liberal traditions, the inherent gender asymmetry associated with polygamy has also provided many of its detractors in the West with a direct link between the practice of polygamy and harm. This criticism is anchored in language which explicitly prioritises the gender imbalance of polygamous marriage—evident in the fact that only men may take additional spouses, and very often women’s right to choose polygamy over monogamy, or obtain a divorce is limited—and the associated concern that this difference automatically and immediately relegates women to a position which is inferior to men. The

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<sup>128</sup> Jonathan Turley, ‘The Loadstone Rock: The Role of Harm in the Criminalization of Plural Unions (2015) 64 Emory Law Journal 1905. Turley was the lawyer acting for Kody Brown and his ‘Sister Wives’ in the American case brought by the Browns challenging the state of Utah’s criminal prohibition on multi party cohabitation. In the article, Turley refers to compulsive liberalism as the ‘loadstone rock’ on which all cases must break, and the ultimate arbiter in determining how social values and individual freedoms balance out in polygamy, using the Hart/Devlin debate on harm to ballast his arguments, arguing that the legal moralism arguments used by Lord Devlin in constructing his argument on harm have returned in the form of an imposed and unreasonable ‘compulsive liberalism’. Turley argues instead for a Millian approach to harm, which calls for more tangible harm to justify limits on individual choice, as he seeks to navigate a path through individual rights and more broad social, moral concerns. Rose McDermott and Jonathan Cowden discuss the harm of polygamy in Bennion, ‘The Effect of Polygyny on Women, Children and the State, where at 139 they confirm their view that “... [t]he promotion of monogamy and female emancipation is a formula for a safer world.” The Court in *Bountiful* was occupied and also largely swayed by conceptions of harm and polygamy in upholding its criminal prohibition in Canada.

worry expressed is that the harm caused by polygamy is suffered by women, never men, and it is severe, causing injury to women's social, economic, physical and emotional wellbeing.<sup>129</sup>

In seeking to understand the precise nature of the allegation of the gender-based harm in polygamous marriage, the recent discussion on polygamy in the Canadian context is helpful. In their analysis of women's experiences of polygamy for the Canadian Department of Justice, Rebecca Cook and Lisa Kelly establish a useful categorisation of the harms one might reasonably associate with polygamy, in particular the gender-based harm thought more likely to arise out of a polygamous marriage.<sup>130</sup> In a comprehensive review of polygamy and harm, Cook and Kelly list patriarchy, non-exclusivity, negative co-wife relationships, mental ill-health, economic harm and a lack of citizenship rights as tangible harms which are more likely to be experienced by women in polygamous relationships.<sup>131</sup> While Cook and Kelly acknowledge that not all polygamous relationships will manifest in the same way, they also reiterate that the harm of non-exclusivity is common to all plural marriages and it is this factor which causes many of the other harms to arise. As a result, they, and many others besides, see polygamy as an unjustifiable violation of women's rights and recommend its elimination.<sup>132</sup>

Picking up on Cook and Kelly's suggestion, it is certainly the case that polygamy continues to be linked to harm precisely because any hardship is ordinarily suffered directly and disproportionately by women in plural marriages. Specifically with regard to non-exclusivity, the introduction of new wives can cause rivalry and competition for resources (both emotional and financial). The stress as a polygamous family multiplies and the lack of exclusivity polygamous wives experience as a result of that expansion is ordinarily more likely to have a negative effect on the wellbeing of the women involved.<sup>133</sup> Although polygamy may have a positive impact on the day to day lives of some women, it is more often associated with the negative impact it can have on women's economic, physical and emotional well being and the

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129 Rebecca Cook and Lisa Kelly 'Polygyny and Canada's Obligations under International Human Rights Law' (Report) (September, 2006) Family, Children and Youth Section, Department of Justice, Canada. Family, and Ruth Gaffney-Rhys, 'Polygamy: A Human Right or Human Rights Violation?' (2011) Vol 2 Women in Society 2

130 Cook and Kelly (n 129).

131 Cook and Kelly (n 129). 'Citizenship rights' include the right to vote and other civil rights.

132 For example, Witte (n 78), McDermott (n 107).

133 Gaffney (n 129) 11.

generally accepted view in the West is that the detriment caused by polygamy will generally outweigh any benefits.

Witte's analysis of polygamy picks up this point. Alongside his comprehensive description of more general, societal harms, he expresses the clear view that polygamy ought not to be tolerated because it causes severe and sustained harm to individual women. In Witte's thesis, polygamy is not just associated with general harm to society, it is also harmful to additional wives because:

*[polygamy]...routinises patriarchy, deprecates women, jeopardises consent, fractures fidelity, divides loyalty, dilutes devotion, fosters inequity, promotes rivalry, foments lust, condones adultery ... and more.*<sup>134</sup>

Once again, Witte's concerns are widely shared, particularly in the West. Turning again to Moller Okin, who refers to studies in which women explicitly deride plural marriage, calling it a barely tolerable institution, she also cites additional studies in which men confirm their use of plural marriage to suit their self-interest (in being cared for by many wives) and as a means of control (in threatening to take additional wives as punishment) presenting a picture of polygamy as irrefutably intertwined with patriarchy and harm to women.<sup>135</sup> Moller Okin and Witte are far from being alone in their condemnation of polygamy on gender grounds. The difficulty in protecting women from male dominance and the physical, sexual, emotional and financial harm this has the potential to cause to women, for some, makes polygamy unforgivably bad.<sup>136</sup> Because polygamy is widely thought of in the West as a form of marriage which serves the needs of husbands, rather than wives, it is inextricably linked with worse outcomes for women and for that reason, commonly described as a 'troubling practice' at best.<sup>137</sup>

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<sup>134</sup> Witte (n 78) 23.

<sup>135</sup> Susan Moller Okin (n 116) 15.

<sup>136</sup> McDermott (n 107).

<sup>137</sup> Nicholas Bala and Rebecca Jaremko Bromwich (n 71) 15



### 2.4.3 Harm and Human Rights

The relationship between polygamy and harm ought to be particularly alarming for anyone interested in human rights according to at least one commentator, who has suggested it is time for human rights advocates to campaign directly for polygamy bans.<sup>138</sup> It is certainly the case that international human rights guarantees are likely to be breached by polygamy, among them, the inherent gender imbalance in polygamous marriage, which seems automatically to violate the human right of women to equal status with men. In the context of marriage, the Universal Declaration on Human Rights ('UDHR') states clearly that equality protections must be permitted to reach into the private sphere, and later human rights covenants also expressly protect equality in marriage and family life.<sup>139</sup> It is also ordinarily the case that polygamous marriage does not envisage anyone of the same sex being able to marry, adding to its lack of equality credentials.<sup>140</sup> Given that polygamy provides men with an entitlement not shared by women, and in light of the disproportionate harm for women which is associated with polygamous marriage, it seems unlikely that the practice of polygamy might be reconciled with the right to dignity, which is also protected in the Universal Declaration and other fundamental human rights conventions.<sup>141</sup> In addition, the practice of polygamy breaches the right to

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<sup>138</sup> McDermott (n 107) 1812 and 1814.

<sup>139</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Article 16: (1) "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family ... [and] ... are entitled to equal rights as to marriage, during marriage and at its dissolution." International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Article 23(4) States must "... take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage ...". Article 3 ICCPR, States Parties have to "...undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.". Similar wording at Article 2 of International Covenant on Economic Social and Cultural Rights (adopted 16 December 1996), entered into force 3 January 1976) 999 UNTS 3 (ICESCR).

<sup>140</sup> Although it might reasonably be considered outside of the ordinary, it is worthwhile noting the exception found by Angela Campbell in her empirical research with women in Bountiful, (n 6) where discussions revealed the existence of same sex polygamy in a religious polygamous setting. Polyamorous relationships are also as likely to be same sex as they are heterosexual.

<sup>141</sup> UDHR Article 1; ICCPR Preamble and Article 10; ICESCR Preamble and Article 13; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS, (American Convention) Article 11; African (Banjul) Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (African Charter), Article 3; Cairo Declaration on Human Rights in Islam (adopted 5 August 1990) (Cairo Declaration) Article 6. Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Hart, 2005) 2 discusses the idea of polygamy and dignity, saying it violates the dignity of women, questions whether it is possible to reconcile where access to plural marriage is not the same for men and women, and given the harm polygamy may cause women in particular, it is arguable their right to dignity is injured by polygamous marriage.

privacy where co-wives are required to live together.<sup>142</sup> The right to an adequate standard of living may also be breached by challenges associated with polygamous co-habitation.<sup>143</sup> Further, the age at which plural wives marry is arguably often lower for polygamous wives and, where children are married, additional international human rights guarantees are breached.<sup>144</sup> Where polygamy engenders a society in which men exercise greater control over women in marriage a variety of rights guarantees requiring free and full consent to a marriage are also infringed.<sup>145</sup> Other rights that are more likely to be engaged by polygamy are the right to education (particularly where young women enter into polygamous marriage),<sup>146</sup> and the right to protection from sexual exploitation.<sup>147</sup> Violence and harmful practices, including female genital mutilation (FGM), which some polygamous societies practice in part to reduce female desire, are also prohibited under international human rights guarantees.<sup>148</sup> While violence against women, sexual slavery and FGM are not restricted to polygamous families or societies, they are more commonly associated with societies in which polygamy is practised, providing more support for the claim that polygamy is more likely to be harmful for women, and that it is likely to result in multiple breaches of women's rights.<sup>149</sup> Nestling comfortably alongside general, Western, liberal critiques of polygamy, the likelihood that polygamy will

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142 Privacy and family life is protected under UDHR Art 12; ECHR, Article 8; ICCPR, Art 17; African Charter, Article 12. The issue of communal living has been highlighted by the group Women Living Under Muslim Laws (Warraich, Sonia and Balchin, Cassandra 'Recognizing the Unrecognized: Inter-Country Cases and Muslim Marriages & Divorces in Britain, Policy Research for Women Living Under Muslim Laws (WLUML Publications, January 2006))<sup>200</sup> where they point out that national legislation will ordinarily have no provision for separate living space for wives, or if it does is often flouted or interpreted to mean only separate bedrooms.

143 UDHR, Article 25; ICESCR, Article 11; among others, going directly to the discussion earlier in Islamic discourse on what it means to treat wives and families equally and fairly.

144 CEDAW, Article 16(2) and the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (Child's Rights Convention).

145 UDHR Article 16(2); ICESCR, Article 10(1); ICCPR, 23(3); CEDAW Article 16(1)(b); UN Convention on Consent to Marriage, the Minimum Age for Marriage and Registration of Marriages (adopted 7 November 1962, entered into force 9 December 1964) 521 UNTS 231, Article 1; American Convention 1969, Article 17(3); African Charter, Article 6. Ruth Gaffney has suggested that, because polygamy engenders a society in which men are more likely to control young women, polygamy contributes to forced marriage and contravenes these sections (Gaffney-Rhys, Ruth 'Polygamy: A Human Right or Human Rights Violation?' (2011) Vol 2 Women in Society 2, 5).

146 Child's Rights Convention, Article 28(1) and ICESCR Article 13.

147 Child's Rights Convention, Article 34.

148 UDHR, Article 5; ICCPR, Article 7; ECHR, Article 3; American Convention, Article 5; Arab Charter, Article 8.

149 McDermott (n 107). Some commentators go so far as to say that polygamy in some contexts is almost like a form of slavery (Gaffney n Gaffney (n 129) quoting Cook and Kelly (n 129)). If she is correct, practices resembling slavery are expressly banned Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (adopted 30 April 1956, entered into force 30 April 1957) 226 UNTS 3, adding further credibility to strict polygamy prohibition.

engage and breach specific international and regional human rights conventions which guarantee equal treatment for men and women seem to situate polygamy firmly on the negative side of the human rights ledger, such that polygamy has even been listed among the ‘harms’ that might prevent returning women to a home country in refugee claims against *non-refoulement*.<sup>150</sup>

Despite that, polygamous marriage is not explicitly prohibited in any international or regional human rights instrument, on equality or any other grounds, begging the question: why not? The African Charter on Human and Peoples’ Rights—operating in a region where polygamy is common—does come close. The Maputo Protocol, as it is known, is considered progressive and comprehensive, a view that is buoyed by the fact it is the only transnational human rights instrument that expresses a clear and unequivocal preference for monogamy. Article 6 of the Protocol on the Rights of Women in Africa states that:

*...monogamy is encouraged, as the preferred form of marriage and the rights of women in marriage and family, including polygamous marital relationships, are promoted and protected.*<sup>151</sup>

While international human rights treaties are largely silent regarding polygamy, human rights bodies have been much more forthcoming in their disapproval, expressing the overwhelming view that it is best discouraged. In particular, the committee with responsibility for overseeing the women’s rights convention, the CEDAW Committee, has made very clear its concern about plural marriage and its role in violating the aims of the treaty, saying:

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<sup>150</sup> *Fatoumata Cynthia Camara v Secretary of State for the Home Department* 18 June 2013, Upper Tribunal, Immigration and Asylum Chamber Appeal Number AA/11020/2012.

<sup>151</sup> Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) reprinted in 1 Afr. Hum. Rts. L.J. 40 (Maputo Protocol) of 54 nations in the African Union, 49 have signed it, 37 have ratified (at July 2016).

*... [polygamy] contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her dependents that such marriages ought to be discouraged and prohibited.*<sup>152</sup>

Other committees with oversight for United Nations treaties have also made clear their view that polygamy violates rights that ought to be protected by the treaties they oversee, including the Human Rights Committee, which has said:

*It should be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should definitely be abolished wherever it continues to exist.*<sup>153</sup>

From the comments of CEDAW and the Human Rights Committee, among others, it is clear that significant international bodies with responsibility for monitoring and implementing human rights are in no doubt: polygamy is harmful and even if human rights instruments themselves do not expressly say so, polygamy breaches human rights standards and ought universally to be abolished.<sup>154</sup> The human rights attitude to polygamy is succinctly summed

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152 UN Committee for the Elimination of All Forms of Discrimination against Women 'General Recommendation 21' on Equality in Marriage and Family Relations, adopted at the Thirteenth Session of the Committee on the Elimination of Discrimination against Women (1994) UN Doc A/34/180 "... Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5(a) of the Convention." In the CEDAW press release, it said even if the tradition of polygamy is firmly rooted, and where a tradition perpetuates discrimination, it must still be addressed directly."

153 UN Human Rights Committee 'General Recommendation 28' UN Doc CCPR/C/21/Rev1/Add 10 (2000).

154 See also, UN Committee for the Elimination of All Forms of Discrimination against Women 'General Recommendation 24' on Article 12: Women and Health), adopted at the Twentieth Session of the Committee on the Elimination of Discrimination against Women (1999) UN Doc A/54/38/Rev 1, chap I which mentions polygamy specifically as a harmful practice. In addition to comments and recommendations, committees with supervisory responsibility for CEDAW, ICCPR, ICESCR, and the CRC have all called for states to abolish and prevent the practice of polygamy, in a variety of concluding observations on countries where polygamy is practised (Cook and Kelly (n 129) at 5, f/n 22, 23, 24, 25 where they list the concluding reports and in particular, note UN Committee for the Elimination of All Forms of Discrimination against Women, 'Concluding Comments on the Initial Report on Namibia' at the Seventeenth Session, Committee on the Elimination of All Forms of Discrimination against Women (1997) UN Doc CEDAW/C/NAM 1. See also UN Press Release 2004 'Customs, traditions remain obstacles to women's rights in Equatorial Guinea say anti-discrimination committee experts' (8 July 2004) WOM/1452 <<http://www.un.org/press/en/2004/wom1452.doc.htm>> accessed 18 April 2017, discussing a country report and describing any law to prohibit polygamy as likely to be 'stillborn' because polygamy sits entirely outside the civil

up in the final quote from the report referred to earlier, by Cook and Kelly on polygamy and human rights:

*Under international human rights law, there is a growing consensus that polygyny violates women's right to be free from all forms of discrimination. Where polygyny is permitted through religious or customary legal norms, it often relies on obedience, modesty and chastity codes that preclude women from operating as full citizens... the physical, mental, sexual and reproductive, economic and citizenship harms associated with the practice violate many of the fundamental human rights recognised in international law... State practice indicates that a complete legal prohibition of polygyny is the norm in most domestic systems...these restrictions reflect not only the socio economic problems associated with polygyny, but also a growing recognition of women's right to equality.*<sup>155</sup>

#### **2.4.4 Harm and Traditional Feminist Discourse**

Rather like the guarantees set out in international human rights treaties, traditional feminist objections to polygamy have much in common with Western liberal values which privilege basic equality, as well as those which reject men's dominance. Because men may have additional wives while women are almost never permitted the same privilege, it is easy to locate polygamy as an inherently unequal and objectionable practice in the traditional equality feminist lexicon. Where women do not have the same access to plural partners, they are at a disadvantage purely because of their sex, meaning polygamy is unquestionably at odds with traditional equality goals.

It is not just liberal feminist aims that are at odds with polygamous marriage, however. Because men are the central 'hub' in polygamous families they are likely to have greater rights and expectations within any given marriage and exert greater control over their spouses, or the

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legal system, although (even if unintentionally) this claim perhaps provides additional evidence for tackling the objectionable practices often associated with polygamy rather than the polygamous marriage itself.

<sup>155</sup> (Cook and Kelly (n 129) 2.

‘spokes’ on the polygamous marriage wheel.<sup>156</sup> In that regard, polygamy also offends feminist concern about male dominance. Radical feminist objections to male dominance are undoubtedly engaged by the possibility of men using the addition of extra wives as a means to control or punish women they are already married to, as well as the negative sex stereotyping of women as the weaker spouse in polygamous marriage. Concern over the potential for male dominance in polygamy, along with other, indirect, factors associated with plural marriage such as the lack of access for women to divorce, the broad age gap between husbands and their often younger wives (particularly for subsequent wives, married later in a man’s life) and the reduced control women more often have in polygamous societies to choose who they marry and when—all reinforce the view of polygamous marriage as patriarchal and domineering, making it objectionable in light of concern over the subjugation of women.<sup>157</sup>

Muslim feminist scholars have also sought to dismiss the practice of polygamy as ‘of its time’ and to interpret those parts of the Qur’an that discuss it as intended simply to affirm its practice and recommend its eventual decline.<sup>158</sup> Amina Wadud, a respected scholar of both feminism and Islam, has argued strongly against the influence of patriarchy in Islamic practice.<sup>159</sup> Specifically with regard to polygamy, Wadud is highly critical of mainstream

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156 Greg Strauss ‘Is Polygamy Inherently Unequal?’ (2012) 122 (3) *Ethics* 516, where he describes a ‘hub and spoke’ model of marriage which, even where the central spouse is virtuous, each peripheral spouse as fewer rights and more obligation than the central spouse. He suggests a revised polyfidelity structure to replace polygamy, removing the inequalities, whereby each spouse is entitled to marry others. Even if difficult in practice, Strauss says this is one method for a more egalitarian approach. Susan Moller Okin discusses the propensity for practices like polygamy to be concerned with control over women, emphasising the inherent potential for power imbalances and patriarchy in ‘Feminism and Multiculturalism: Some Tensions’ (1998) 108(4) *Ethics* 661-684.

157 Lama Abu-Odeh, ‘Modernizing Muslim Family Law: The Case of Egypt’ (2004) 37 *V. and J. Transnat’l L.* 1043, 1145 where she states the feminist position is that polygamy should be prohibited. Her article details a range of modern, secular and feminist objections to polygamy and other Islamic family practices, with a comparative analysis of Egypt, Jordan and Tunisia. For an alternative view on dominance and subjugation in marriage and whether that is more or less of a problem in polygamy or monogamy, see Adrienne Davis (n 9) 1972, discussing the fact that monogamous marriage can result in women doing everything on their own at home while also trying to pursue careers so they are exhausted, or having to battle with their husbands to share the load and be exhausted and battle weary and either way, their needs are subjugated in dyadic marriage too.

158 Asma Lamrabet, *Women and the Qur’an; An Emancipatory Reading* (Square View, 2016).

159 Amina Wadud, *Qur’an and Woman; Reading the Sacred Text from a Woman’s Perspective* (OUP, New York, 1999). Wadud’s ground-breaking re-evaluation of Islam and the lives of Muslim women under Islamic law is not so different from that of Chinkin and Charlesworth, in laying the blame for gender inequality at the door of men’s domination of the content, interpretation and jurisprudence around Islamic and international law, respectively – in each setting, men were included, women were not and in each case, this has had great bearing on the way laws are framed. And yet in the mainstream, while the work of Chinkin and Charlesworth

Muslim interpretations of the Qur'an that suggest that the sacred text permits polygamous marriage.<sup>160</sup> As earlier accounts of polygamy in Islam have confirmed, she is not alone. In her book on women and gender in Islam, Leila Ahmed quotes Malak Hifni Nasif, writing in the early part of the twentieth century on polygamy, where she describes the word 'co-wife' as 'women's mortal enemy', saying of polygamous marriage:

*... how many hearts has it broken, how many minds has it confused and homes destroyed, how much evil brought and how many innocents sacrificed and prisoners taken for whom it was the origin of personal calamity ... [Polygamy] is a terrible word laden with savagery and selfishness ... Bear in mind that as you amuse yourself with your new bride, you cause another's despair to flow in tears ...*<sup>161</sup>

It is worth noting that, for some wives, polygamy is not viewed in this way. In debunking feminist criticisms of polygamy, Elizabeth Joseph, an advocate for both women's rights and polygamy, herself a polygamously married wife (until the death of her husband), as well as a lawyer, journalist and academic, has described polygamy as the 'ultimate feminist lifestyle' citing the opportunities it has provided to her as a career woman and a mother. She has presented a view of polygamy as offering "an independent woman a real chance to have it all" based on her own experience of it as both empowering and liberating, enabling her with enough family support to pursue her career and manage her family obligations more comfortably.<sup>162</sup> And it is not just Mormon polygamous wives who report positively on the

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is celebrated as being innovative, insightful and forward looking (a position this work supports), Wadud and others like her seem unfairly to be met with a more suspicious and less generous response, a response which is more likely be used to illustrate all that is wrong with Islam, rather than to showcase Wadud as a progressive voice seeking positive changes for women, as Chinkin and Charlesworth are viewed. So often, when commentary like Wadud's reaches the mainstream, the focus is on Muslim men who may oppose her, so that the voice of another Muslim woman—one who is advocating for change basing her arguments on the same Islamic principles traditional Muslims say make that change impossible—is effectively silenced once more.

<sup>160</sup> Amina Wadud (n 159) 85.

<sup>161</sup> Leila Ahmed, *Women and Gender in Islam Historical Roots of a Modern Debate* (New Haven, 1992).

<sup>162</sup> 'Polygamist wife contends polygamy is the ultimate feminist lifestyle' *Las Vegas Sun*

<<https://lasvegassun.com/news/1997/may/05/polygamist-wife-contentends-polygamy-is-the-ultimate-/>>(5 May 1997) accessed 21

April 2017 and John Tierney, 'Who's Afraid of Polygamy?' *New York Times* (11 March 2006)

<<http://query.nytimes.com/gst/fullpage.html?res=9C04EEDA1331F932A25750C0A9609C8B63>> where he discusses Joseph's views on polygamous marriage as being emancipatory and empowering. See also Bennion 'Progressive Polygamy in Western United States'

practice of polygamy for them; Muslim women are capable of being happy plural wives too.<sup>163</sup> Still, when it comes to equality, dominance and polygamy, the views expressed by Joseph and others like her are not the norm. While the idea of a feminist friendly form of polygamy is increasingly being considered possible (and will be discussed in detail later in this work), polygamy's denouncers continue to speak with the loudest voices, particularly in the West.<sup>164</sup> In traditional feminist discourse polygamy is ordinarily viewed as a family model in which men's power pervades, making it objectionable from a range of feminist perspectives.

## 2.5 Harm and the Regulation of Polygamy

The disquiet about polygamy has acted as the prompt for a raft of legislative interventions by states to limit its practice, both for Muslims and more generally.<sup>165</sup> This section charts the response to polygamy across an assortment of jurisdictions in an effort to show the diverse ways in which the harm so often associated with polygamy is managed and to provide a comparative basis for the examination of the treatment of polygamy in the United Kingdom, in the following chapter. In reviewing polygamy regulation, this work adopts in part the typology used by Angela Campbell in her examination of the global treatment of polygamy in

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in Den Otter *Beyond Same Sex Marriage* (Lexington, 2016) where she challenges the popular view of polygamy as subordinating women, highlighting the experience of a series of families who practice progressive forms of polygamy which reflect feminist values.

163 Shagufta Yaqub, 'Private Wives' *Guardian* (12 August 2005) <<https://www.theguardian.com/world/2005/aug/12/gender.uk>> accessed 21 April 2017, on women's positive experiences of Islamic polygamy.

164 For more information on the way polygamy might comply with feminist aims see, Alexandre, 'Big Love' (n 87) and 'So Long a Letter' (n 99). Also Calhoun (n 69) where she posits that polygamy may not always be incompatible with liberal and egalitarian aims.

165 Aside from the approbation in human rights documents, the Hague Convention on the Celebration and Recognition of Marriages 1978 (adopted 14 March 1978, entered into force 1 May 1991) 16 ILM 18 Article 11 also states that a contracting state can refuse to recognise a marriage if '... at the time of the marriage under the law of that state ... one of the spouses was already married.' The aim of this Convention is to ensure the recognition of valid marriages between countries, rather than to provide for human rights guarantees relating to marriages and polygamy is not prohibited for states parties. But states can refuse to recognise plural marriages, where plural marriages are not permitted by them according to this document. Only three states have ratified this Convention (Australia, Luxembourg, Netherlands), however, and it has little practical effect, even if it reflects the conflicts of laws approach which is adopted by most states in practice.



which state responses are classified as ‘permissive’, ‘prohibitive’, or ‘combined’ in their approach to regulation.<sup>166</sup>

### 2.5.1 Regulation in Permissive States

Those jurisdictions that express a more tolerant attitude to polygamy are located in the Middle East, Africa and Asia, where deference to Islamic personal law, local custom, or both, is ordinarily the basis for a permissive approach.<sup>167</sup> State intervention to prevent harm is still the norm even in permissive societies, where separate systems of personal law tend to co-exist alongside other laws that govern family matters.<sup>168</sup> Official responses to polygamy in permissive states are not uniform, however, and different jurisdictions implement their own interpretation of the fairness requirement in Sura 4:3. Formal efforts to ensure fair treatment may manifest in the requirement for formal permission to enter into an additional marriage,

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166 Angela Campbell, ‘How Have Approaches to Polygamy Responded to Women’s Experiences and Rights? An International, Comparative Analysis’ in Angela Campbell and others ‘Polygamy in Canada: Legal and Social Implications for Women and Children: A collection of Policy Research Reports. Final Report, Status of Women Canada (November, 2005).

167 Although polygamy is generally less common than monogamy, it is said to be permitted in 85% of societies around the globe Katherine Charsley and Anika A. Liversage, ‘Transforming Polygamy: Migration, Transnationalism and Multiple Marriages Among Muslim Minorities’ (2013) Vol 13(1) *Global Networks* 60. Although permitted by law, the frequency of polygamous marriages varies widely in these areas: while almost 20 per cent of Saudi Arabian marriages are polygamous, the practice is rare in Indonesia, the most populous Muslim country. According to Charsley, the highest occurrence is found in Sub-Saharan Africa (citing Coulibaly et al. 1996, in Sargent and Cordell 2003: 1962). Although, particularly in the African region, there are different historic justifications for allowing polygamy, which include Cameroonian Christian polygamists. Ruth Gaffney also discusses this in her article ‘The Legal Response to Polygamous Marriages in England and Wales’ (2011) 4 *International Family Law* 319 where she confirms that, in several African jurisdictions including Mozambique, Kenya, Botswana and Ghana polygamy is a traditional practice governed by customary law, Nigerian law permits polygamous marriage according to both customary and Islamic law and that polygamy is also permitted in some African and Asian jurisdictions under civil laws which are usually adopted to formalise the customary law position (Zambia) or Islamic law (Iran, Pakistan). Another useful comparative account is contained in a report prepared by the Utrecht Centre for European Research into Family Law, ‘The Legal Status of Polygamous Marriages: A Comparative Law Perspective’ (2009), available at <[https://www.wodc.nl/images/1815\\_volledige\\_tekst\\_tcm44-247785.pdf](https://www.wodc.nl/images/1815_volledige_tekst_tcm44-247785.pdf)> (accessed 21 April 2017); available in Dutch only, no English language version available and Zeitzin (n 73) 14.

168 Family and personal matters are, for many Muslims, governed by the Qur’an and Shari’a over ordinary civil law. This is in part because the Qur’an devotes much attention to marriage, divorce, inheritance and other personal matters. The extent to which Muslim personal law applies for Muslims around the world varies. Its application may be governed in some instances by an over-arching civil code, such as in India, where the formal application of Muslim personal law is governed by the Muslim Personal Law (Shariat) Application Act 1937, along with other legislation dealing with specific issues such as marriage. For more information on Muslim personal law see Pearl and Menski (n 98) and Andrew Rippin (ed) *The Islamic World* (Routledge, 2008).

and that permission may be refused where evidence can be produced to show that a husband will not be able to treat his wives equally.<sup>169</sup> In some states it is possible for wives to insert additional clauses into marriage contracts prior to a marriage that remove the right of their husband to take an additional wife, thereby protecting women from being forced into polygamous families. Where a contractual prohibition is ignored, this may be considered a valid ground for a wife to obtain a divorce.<sup>170</sup> In other permissive states, polygamy is permitted with very few restrictions, except those that are set out in the Qur'an.<sup>171</sup>

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169 In Pakistan, Morocco, Iran, Iraq, Indonesia, Libya, Syria and Somalia for example, formal judicial permission must be obtained before a polygamous marriage can be entered into. In Pakistan, The Muslim Family Law Ordinance 1961 governs personal laws for Muslims, allowing polygamy provided the consent of all wives is gained in advance and the husband is able to show he can adequately and fairly take care of all wives. In Iran, The Family Protection Act 1967 provides legal protection for women in plural marriages, although here, it is the husband's finances and his capacity to treat all of his wives equally which are assessed by a court before any permission is granted and a polygamous marriage can go ahead. The law in Iran also prescribes punishment for any man who contracts a polygamous marriage without adhering to the strict legal prerequisites, where the husband is liable to imprisonment for up to two years. In Iraq, The Iraqi Law of Personal Status 1959, which says a polygamous marriage will not be permitted unless prior authorisation from a judge is obtained, that authorisation being based on an assessment of the husband's position and a decision that he is financially capable of supporting two wives and that there is not risk of unequal treatment. In Somalia, The Somali Family Law of 1975 provides the permission of a court must first be obtained before a second marriage can be contracted. The utility of this law is limited by the fact a wide range of factors may be considered good reasons for a husband to take an additional wife, including an earlier wife's sterility and illness, as well as 'social necessity'. The Marriage Law (1974) requires that strict conditions must be complied with before a second marriage can be entered into in Indonesia, the world's most populous Islamic state, and wives must first give their permission. The Syrian Law of Personal Status provides that a husband must be in a position to support additional wives to enter into a polygamous marriage - 1953 (Decree No. 59 of 1953), although at the time of writing there are obvious difficulties with enforcement. There are also legal restrictions on polygamy in Yemen (Family Law No 1 (1974), which upholds monogamy as the preferred form of marriage, although polygamy may be permitted by a court where a wife is deemed not to be able to provide children or is sick) and Singapore (Muslim Marriage Act 1966 and the Administration of Muslim Law Act (1966). More information about polygamy in Pakistan in the Report of the Pakistani Commission on Marriage and Family Laws, Gazette of Pakistan, "Extraordinary", June 20, 1956, 1215-1218. Bangladesh has taken some of the provisions of the Muslim Family Law Ordinance from Pakistan and has enacted the Muslim Marriages, Divorces (Registration) Act (1974) which allows polygamy provided formal permission has previously been obtained, although the climate becoming ever more hostile locally towards polygamy, with stronger legal controls including the introduction of taxes for any man wishing to enter into a polygamous marriage (Peter Foster, 'Bangladeshi men face tax on polygamy' *The Telegraph* <<http://www.telegraph.co.uk/news/worldnews/asia/bangladesh/1520485/Bangladeshi-men-face-tax-on-polygamy.html>> (6 June 2006). For an overview see Angela Campbell (n 166) 33.

170 For example, divorce is permitted for women in polygamous marriages in Morocco, either because equal treatment is not possible, or because any second marriage is not permitted under a marriage contract. Similar restrictions are in place in Algeria and Egypt, where men must have a clear and genuine need to enter into a second marriage and must treat each wife equally, and where women are able to get a divorce because they object to a second marriage.

171 Angela Campbell (n 166) 33. In Saudi Arabia, for example, where state regulation is not generally provided where a wife chooses to leave a polygamous marriage, she will lose all financial benefits, including maintenance and her right to live in a particular home, unless it is registered in her name.

Despite regulation in jurisdictions where polygamy is permitted and its potential to provide some protection from harm, there are often difficulties in enforcing protective laws in practice. In some cases, this may be because women come under pressure, be it familial or practical, not to exercise their rights under the marriage contract, or a court may simply give a husband's evidence more weight, or take it as unchallenged whether there is a dispute over a polygamous marriage.<sup>172</sup> Any apparent protection offered by a legislative obligation on husbands or a marriage contract may simply not be effective in reality. By way of example, in Pakistan, while legislative protections exist, the law that are designed to protect women in polygamous marriages have been described as a 'dead letter' because the authorities make little effort to enforce them.<sup>173</sup> Further, in states like Somalia, Syria and Libya, where effective and functioning governmental, legal and administrative authorities do not always exist, with the best will in the world, the laws designed to protect women in polygamous marriage are virtually impossible to enforce. A lack of education or knowledge on the part of women may also make protection utterly useless in practice, despite the existence of formal legal protections.

### 2.5.2 Regulation in Combined States

In 'combined' states polygamy is permitted, but only for certain members of the community or in particular cases.<sup>174</sup> In India for example, polygamy is banned, although only among

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<sup>172</sup> Pearl and Menski (n 98) 244,

<sup>173</sup> Pearl and Menski (n 98) 256, 257. For a discussion on regulation in permissive states which suggests that such regulation signals the beginning of the end for polygamy in the Islamic world see Ameneh Maghzi and Mark Gruchy 'The Dialectic of Islam and Polygamy' in Ronald C Den Otter 'Beyond Same Sex Marriage: Perspectives on Marital Possibilities (Lexington, 2016).

<sup>174</sup> The term 'combined' is adopted directly from the research of Angela Campbell (n 166) 28, to categorise those states that have dual systems of marriage management so that polygamy is permitted in some situations for some people, and prohibited in others. This approach might also be referred to as 'tolerance' but that term is not used in part because it has a range of more broad connotations in academic literature, for example in denoting behaviour which is designed to make the state look virtuous, or as though it is protecting behaviour which is valued (for example, like free speech, or women's rights), or in a more subversive way as 'tactic of subjection' where tolerance is actually used to keep the 'other' contained. It is that final idea of tolerance which might most closely be associated with states which opt for a combined approach to polygamy in that they do not seek to do so in an effort to align themselves with virtue, rather, they permit polygamy in grudging acceptance of their Muslim population, and largely because it provides the opportunity to contain the application of personal law according to the Qur'an. Either way, the idea of 'tolerance' is complex and loaded, and so it is not generally used here to describe states whose default is to be prohibitive but who allow polygamy

Hindus. It is tolerated for Muslims, if not encouraged.<sup>175</sup> In some cases, Indian judges have indicated real concern about the on-going practice of polygamy, even referring to it as an “unremitting wrong” to the first wife in any polygamous marriage.<sup>176</sup> However, despite polygamy being banned for Hindus and there being some unease about the operation of a dual system of personal law giving Muslim men more freedom than others, the Indian Government has not legislated specifically to provide additional protection for Muslim wives in the way other states with large numbers of Muslim inhabitants have done.<sup>177</sup> Some African states have also adopted laws that plot a combined path between customary and civil laws, attempting to balance the two. Prospective spouses in such jurisdictions are often free to choose whether they wish to marry under the civil law or according to customary laws that allow polygamy. The South African Law Reform Commission has also recommended the right to marry polygamously be extended to Muslims marrying under Islamic Law. Should this recommendation be taken up, South Africa will operate a combined approach to the practice of polygamous marriage which takes into account civil, customary and religious lives of citizens, an approach already adopted by other African states.<sup>178</sup>

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for Muslims. For more information on the idea of tolerance see Wendy Brown, *Regulating Aversion; Tolerance in the Age of Identity and Empire* (PUP, 2006) 25, 105 and Lorenzo Zucca ‘Tolerance or Toleration? How to Deal with Religious Conflicts in Europe (August 12, 2010) in *A Secular Europe: Law and Religion in the European Constitutional Landscape* (OUP, forthcoming) SSRN: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1592425](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1592425)> (accessed 22 April 2017).

175 The Hindu Marriage Act (1955) bans polygamy for Hindus. The leading Indian case on Muslim polygamy is *Itwari v Asghari* AIR 1960 A1 684, polygamy is to be “... tolerated but not encouraged.” See also Cyra Choudhury, ‘Between Tradition and Progress: A Comparative Perspective on Polygamy in the United States and India’ (2012) 83 University of Colorado Law Review 963 for a brief history of the response to polygamy in India, where she says the banning was piecemeal to being with and the case *State of Bombay v Narasu Appa Mali*, AIR 1952 Bom 84, 18 (India) challenged The Bombay Prevention of Hindu Bigamous Marriages Act 1946, the legislation that preceded the federal legislation post-independence. In this case, the court reached a similar conclusion to that in *Reynolds*, upholding criminalisation of plural marriage for Hindus.

176 For examples of the strength of opinion in Indian judicial comment, see also *Ayat-un-Nissa v Karam Ali*, ILR [1908] 36 Cal 23, referring to polygamy as a continuing wrong to the first wife; *Shahulameedu v Subaida Beevi*, 1970 KLT 4, where the judge expressed the view that it was unlikely plural marriage was supported in Muslim law and “...those who quote the scared Koran or cite the holy Prophet as sanctioning for a male the rather unholy practice of a conjugal quadrangle are sinning against their religion itself”.

177 Pearl and Menski (n 98) 244; general acts of parliament are used together with the Indian Constitution, in line with the wording and interpretation of the Qur’an, to regulate polygamy. The political climate and the sometimes violent tension between Hindus and Muslims in India may explain the reluctance on the part of the Indian government to legislate to restrict or ban polygamy for Muslims, despite obvious concern.

178 Angela Campbell (n 166) 27 which mentions the extension of rights to women married under customary law, the basis for which is they will be at risk of economic instability and hardship. Commentators have said this is a more appropriate response to customary marriage than an outright ban, a point which is picked up later in this research.

### 2.5.3 Regulation in Prohibitive States

Prohibitive states are those that have rejected the idea of regulation in favour of an outright ban. Using civil law, prohibitive states make polygamous marriages invalid, ensuring they do not benefit from legal entitlements. Using criminal law, where states object strongly to polygamy they may also punish plural marriage by providing criminal sanctions for polygamous cohabitation.<sup>179</sup> This group includes states where Islam is the prevailing religion. In Tunisia and Turkey, for example, legislators have introduced an outright ban based largely on concerns over gender equality and fairness, and the challenges associated with the effective regulation of polygamous marriages. Polygamy is most often proscribed, however, in states where Islam does not dominate, including across North America, the United Kingdom, the European Union, Australia, New Zealand and in some parts of Asia, the Pacific, and Central and South America.<sup>180</sup> Unlike most jurisdictions where Islam is a major religious influence, these states insist on monogamy for all citizens, be they Muslim or not. Where a spouse wishes to marry again, they will generally insist on a legal separation between a husband and wife before any other relationship is formally, and sometimes informally (or religiously), entered into.

Despite the much less accommodating approach to polygamy in prohibitive states, it is worth noting that *de facto* polygamy continues to occur in many of these jurisdictions, in a number of

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<sup>179</sup> Fournier's discussion (n 127) provides a useful overview.

<sup>180</sup> In New Zealand marriage is defined in s 2 Family Proceedings Act and, like the position in the United Kingdom, that includes valid, foreign polygamous marriages for non-domiciles. Bigamy is, however, proscribed by s 205 Crimes Act 1961. In Australia, marriage is governed by the Marriage Act 1961. Bigamy is an offence in all States and Territories in Australia (s 94 Marriage Act 1961). Calls for recognition of domestic polygamy for customary reasons have been rejected in Australia and New Zealand, see Australian Law Reform Commission 'Multiculturalism and the Law' (Report No 57) (1992) <<http://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc57.pdf>> accessed 22 April 2017 and Australian Law Reform Commission (Report No 31) 'The Recognition of Aboriginal Customary Laws' (1986) <<http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC31.pdf>> accessed 22 April 2017, Ann Black 'In the Shadow of our Legal System: Shari'a Courts in Australia in Ahdar, Rex (ed) *Shari'a Law in the West* (OUP, 2010), and *Rangi Kerehoma v Pub Tr* [1918] NZLR 903 (SC) available at <<http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZGazLawRp/1918/145.html?query=rangi%20kerehoma>> accessed 22 April 2017, and Nan Seurffert 'Shaping the Modern Nation: Colonial Marriage Law, Polygamy and Concubinage in Aotearoa New Zealand (2003) 7 Law Text and Culture 186, 207-12.

different forms. Most notably in the North American region, Mormon fundamentalist polygamous families have long existed, persistently ignoring state and federal prohibitions on plural marriage since The Church of Jesus Christ of Latter Day Saints was founded by Joseph Smith in North America in 1830.<sup>181</sup> For Mormons, marriage is central both to religious faith and social interaction because it is viewed as being essential to resurrection after death and becoming closer to God. The ‘Doctrine and Covenants of The Church of Jesus Christ of Latter Day Saints’ makes it clear that plural marriage is not available to women, and is—as it is in Islam—the limited privilege of men.<sup>182</sup> Mormon polygamy was criminalised under the Morrill Act in 1862, which prohibited plural marriage in all territories of the United States.<sup>183</sup> This legal ban was not particularly successful in eliminating polygamy, however, and Mormons continued to enter into polygamous marriages.

In North America, the recent case of *Brown v Buhman* has challenged Utah’s state ban on religious polygamy.<sup>184</sup> The Browns became famous following their reality television show ‘Sister Wives’ and were prosecuted by state authorities as a result. The lower Court struck down the criminal prohibition on polygamy as unconstitutional. This decision was appealed by the state of Utah, and that appeal was dismissed for technical reasons relating to standing.<sup>185</sup>

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181 Doctrine and Covenants of the Church of the Latter Day Saints (Doctrine and Covenants), Section 132, Verses 61-63; “... [if] after she is espoused, [she] shall be with another man, she has committed adultery, and shall be destroyed ...” However, the polygamy practised by Mormons differs in a range of ways from that practised according to the precepts of Islam. In Mormon polygamy, there is no limit on the number of wives a husband may take and there is no underlying set of guiding principles for participants of Mormon plural marriage to follow. Further, according to the Doctrine and Covenants any man who does not abide by the covenant to enter into plural marriage is damned and may not be permitted to enjoy the glory of God in the afterlife, lending polygamy an almost compulsory character for fundamentalist Mormons; a sentiment which is completely absent from Islamic polygamous doctrine. In Islam a maximum of four wives is permitted and the Qur’an also contains guidance as to the equal treatment of wives. For a helpful overview of Mormon polygamy and its regulation in the United States, see Sigman (n 78).

182 Doctrine and Covenants, Section 132, Verse 4.

183 This was according to c. 126 of the elaborately named ‘Act to Punish and Prevent the Practice of Polygamy in the Territories of the United States and Other Places, and Disapproving and Annuling Certain Acts of the Legislative Assembly of the Territory of Utah 1862’ also known as the ‘Morrill Act’. The Act stated that “... every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall ... be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years.”

184 *Brown v Buhman* (10th Circuit) (n 9).

185 *Brown v Buhman* (10th Circuit) (n 9). In effect, because the Browns were no longer being prosecuted by the State for polygamy, they had no standing to bring the case against the State.

Although the state authorities withdrew the prosecution, the Browns sought leave to appeal to the Supreme Court, on the basis that the continued possibility of prosecution breached their right to religious freedom, privacy and free speech. That request was denied earlier this year, arguably leaving the future direction of the American approach to polygamous cohabitation somewhat unsettled.<sup>186</sup> In any event, the initial decision in the *Brown* case illustrates a judicial willingness for sharp formal divergence from the reasoning of earlier, much more prohibitive cases on polygamy in the United States, like that in *Reynolds*. As the *Brown* case played out it became apparent that, in the absence of any clear harm or abuse, the Court was willing either to condone or ignore religious polygamy on the basis that not doing so would cause much greater harm to the parties involved. In this regard, *Brown* reflects a greater willingness to engage with the reality of polygamous marriage instead of simply casting polygamy as an irredeemably harmful practice, as in *Reynolds*.<sup>187</sup> As Ron Otter has written in defence of plural marriage, simple references to harm, whether to women, society or in offending rights, are increasingly being called into question in prohibitive states, so that where states wish to maintain criminal prohibitions on polygamy:

*[I]n articulating their normative constitutional view, they will have to do more than consult a dictionary, refer to religious understandings, conduct survey research, embrace “tradition”, investigate how most people happen to use the “m” word, put forth empirically unfounded claims, or generalise from outliers.*

When it comes to polygamy, the very foundation of constitutional rights and their relationship with harm are increasingly being put to the test in prohibitive states as those who seek the freedom to marry unconventionally are resisting legislative requirements to do otherwise.<sup>188</sup>

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<sup>186</sup> *Brown v. Buhman* (No 16-333) 580 US (1.23.2017).

In practice the state authorities tend not to prosecute unless there is abuse, breach of another law like child marriage, etc.

<sup>187</sup> *Reynolds* (n 108).

<sup>188</sup> Casey Faucon, ‘Polygamy After Windsor: What’s Religion Got to do with It?’ (2015) 9 *Harvard Law & Policy Review* 471 says the legal tide is beginning to shift in favour of polygamists in America. The focus in *Brown* signifies a sharp turn away from the reasoning in *Reynolds*, even if this doesn’t represent a change to the legal definition of civil marriage, which still involves only two people. Strassberg has argued strongly against this position, stating the state ought to have relied on the reasoning in the *Bountiful* case, instead of the *Reynolds* reasoning, in arguing to maintain the criminalisation of polygamy. The *Bountiful* reasoning was “compelling” according to Strassberg and had the state offered it to the court in *Brown*, she suggests the outcome would have been different. See also Ron C Den Otter, ‘Three May not be a Crowd: The Case for a Constitutional Right to Plural Marriage’ (2015) 64 *Emory Law Journal*

Over the border, the ‘Bountiful’ Mormon polygamous community in Canada has also attracted the attention of the state and the legal community as a result of the provincial government raising the question of the reasonableness of the enforcement of anti-polygamy laws. The *Bountiful* case, in which the constitutional legality of the ban on polygamy in Canada was questioned, also raised issues reminiscent of the *Reynolds* decision over a hundred years earlier, with the provincial authorities asking the British Columbia Supreme Court to consider whether the criminal law prohibiting polygamy in Canada is consistent with the Canadian Charter of Rights and Freedoms.<sup>189</sup> The underlying reason for the referral of this question to the Court was to establish whether or not the provincial authorities might prosecute polygamists according to the Canadian Criminal Code which bans polygamy, without violating the right to religious freedom and free association, which is expressly protected according to the Canadian Charter, itself supreme law.<sup>190</sup> Unlike the District Court in *Brown*, the provincial Court in *Bountiful* concluded, “... there is no such thing as good polygamy” and came to the decision that an assessment of this type must again essentially be concerned with harm.<sup>191</sup> The Court in *Bountiful* framed its objections to polygamy in the context of an increased risk of harm to individuals—specifically, women—in polygamous marriages and the criminal prohibition on plural marriage was upheld on that basis.<sup>192</sup> Despite the outcome the *Bountiful* case has provided a prompt for prolific academic, legal and policy discussion on polygamy and it is

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1747 where he says similar things, but this time in favour of recognising polygamy, referring to *United States v Windsor* 570 US \_\_ (2013) where strong references to dignity are likely to mean judges may be more reluctant to “... restrict marriage to a man and a woman if such a restriction is predicated upon demeaning sexual minorities.” He goes on “[A]t stake is nothing less than discerning the meaning of the United States Constitution when those who have different ideas about marital relationships want the freedom to live unconventionally” (at 1981)

189 *Reynolds* (n 108).

190 *Reference* (n 5), Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982.

191 *Reference* (n 5) paragraph 1343.

192 *Reference* (n 5) paragraph 1343. Prior to *Brown*, courts at all levels in the USA had consistently upheld the constitutional validity of prohibitions on plural marriage in the face of challenges on the grounds of free exercise, due process or equal protection, according to the evidence of Professor Hamilton, cited in the *Bountiful* decision, paragraph 334. The only similar case in the United Kingdom is that of *Bibi v United Kingdom*, Application No. 19628/92, a claim to the European Court of Human Rights against immigration restrictions on polygamous families, primarily focused on the right to a family life under Article 8 ECHR.



clear there remains strong support for rethinking polygamy, harm and its regulation, with many scholars calling for polygamy either to be recognised or de-criminalised.<sup>193</sup>

While Mormons continue to be the most prominent polygamists in North America, other communities also practice polygamy in this region. In particular, it is becoming more evident among first and subsequent generation Muslim migrant families. Although still less visible than Mormon fundamentalist polygamy in North America, evidence exists to show that Muslims and other migrants have settled in the United States, where they practice polygamy illegally.<sup>194</sup> In spite of it being universally prohibited, polygamy among Muslim communities is also now more prominent across Western Europe, and this is likely to be largely as a result of increasing numbers of Muslim migrants to the region. While it is not possible to obtain reliable statistics for the rates of Islamic polygamy in Europe, globalisation, post-war migration from former colonies and recent conflict have all resulted in an increase in the movement of people and a rise in migrants to European countries.<sup>195</sup> Early migrants brought their polygamous families with them prior to immigration bans, and more recently there is evidence that male workers who have come as economic migrants have met their emotional needs following separation from their families at home by taking new wives and establishing families in their new home

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193 There are many scholars discussing polygamy in the Canadian context, but the primary ones among them calling for a polygamy 're-think' are Angela Campbell 'Wives' Tales: Reflecting on Research in Bountiful' in Provost, René and Sheppard, Colleen (eds) *Dialogues on Human Rights and Legal Pluralism* (Springer, New York 2013); *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (Ashgate, Farnham 2013); 'Bountiful's Plural Marriages' (n 6) 43, where Campbell encourages the privileging of the experiences of women in polygamous marriage in discussing whether the state ought to reconsider its approach to the criminalisation of polygamy in particular. Martha Bailey and Amy Kaufman have also examined the treatment of various forms of polygamy, resisting calls for its legalisation in the domestic sphere, but questioning its criminalisation, and also suggesting wider acceptance of foreign polygamous marriages in *Polygamy in the Monogamous World* (n 2) and 'Should Civil Marriage Be Opened Up To Multiple Parties?' (n 8) 1747. Other collections illustrate the increasing Canadian and wider North American interest in polygamy, including, Janet Bennion and Lisa Fishbayn Joffe (eds) *The Polygamy Question* (n 7) and Gillian Calder and Lori G Beaman *Polygamy's Rights and Wrongs* (n 6).

194 For example, the Hmong people from Laos, who helped the Americans in the Vietnam War and settled in the United States afterwards. Zeitzen (n 73) 166. For more information see Kecia Ali, (n 100) 620.

195 K Charsley and A Liversage (n 167) 4. Zeitzen (n 73) 5, where the authors confirm it is not possible to get reliable statistics on rates of polygamy for Muslim populations in Europe. See also Ziauddin Sardar in Syed Z Abedin and Ziauddin Sardar (eds) *Muslim Minorities in the West* (Grey Seal, 1995) 1, where Sardar estimates there are 15 million Muslims in Europe. Different countries have Muslims predominantly from different places; for Germany often its Turkey, for France the Maghreb, Muslims living in England are historically South Asian, although increasingly they come from sub Saharan Africa and Middle East conflict zones. This is largely in contrast with North America where selective immigration policies have targeted middle class and professional Muslim groups.

country.<sup>196</sup> Research has shown that this sort of transnational polygamy is often practised by young men who wish to fulfil dual marital aspirations for a range of reasons.<sup>197</sup> This may be either because divorce is viewed negatively by their religious and cultural communities at home, or because they are trying simply to maintain companionship where they are working, while at the same time, preserve the families they have left behind. These polygamous relationships involve multiple marriages, only one of which is registered and recognised in the receiving state. The parallel existence of religious and civil marriages (and in some cases, divorces) or transnational marriages that are recognised in separate civil contexts creates the opportunity for polygamy to exist in prohibitive states in Europe, without engaging the legal system which prohibits it. In this example, migration clearly creates the conditions, the opportunity and in some cases, the motivation for polygamy so that:

*[C]o-existing legal systems within and between countries, norms surrounding marriage and divorce, tensions of competing marital aspirations, and the distance created by migration, all combine to create situations where men (and, to a much lesser extent, also women) are, in one form or another, married to more than one person at the same time.*<sup>198</sup>

Whatever the prompt, the increased incidence and visibility of polygamy in many parts of Europe even though plural marriage is not permitted, has illustrated that “no culture is immune from outside influences or indeed from increasingly self confident internal forces for change” however prohibitive it may formally be.<sup>199</sup> In spite of strict legal prohibitions on plural marriage, economic migrants and refugees have commonly brought polygamy with them to Europe through whatever means possible.<sup>200</sup>

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196 K Charsley and A Liversage (n 167)

197 K Charsley and A Liversage (n 167) 10. Charsley also talks about marriage being used as a way of circumnavigating immigration restrictions in Denmark; the so called ‘Turkish Trick’ –where a male migrant later divorces his Danish wife and returns to Turkey to bring his Turkish wife to Denmark with him, although this has been made more difficult in practice with changes to Danish law.

198 K Charsley and A Liversage (n 167) 17, 20.

199 Zeitzen (n 73) 165.

200 K Charsley and A Liversage (n 167) 5.

## 2.6 Rethinking Polygamy and Harm

### 2.6.1 The Benefit in Rethinking Harm

As this chapter has sought to outline, the association between polygamy and harm is long and it remains strong today, cross a range of jurisdictions. Certainly in the West, the overriding view of polygamy is that it is inconsistent with human rights and feminist aims, as well as harmful to women and society, requiring strong regulation in the form of outright prohibition. However, while polygamy has a strong association with harm, that link is not always unconditionally accepted. Despite the apparently overwhelming evidence of the harm caused by polygamy, calls for more thoughtful legal treatment have been made. The discussion on polygamy and harm has been particularly active in the North American context, where questions about polygamy's inherent harmfulness have been situated in a more progressive dialogue which does not rely on categorising the uncivilised 'them' from the civilised 'us'; a discourse which ignores the "messy, lived experiences of family and community life [which defy] the categorisation of polygamy as either harmful or unproblematic."<sup>201</sup>

As part of a collection of reports produced to reflect on the legal and social implications of polygamy around the same time as Cook and Kelly's research, Professor Angela Campbell offers a more considered view of the link between polygamy and harm.<sup>202</sup> Her report, focusing more broadly on polygamy in an international setting and intended to assess whether responses to polygamy adequately address the "needs, interests and realities..." of women living within plural marriage, concludes that:

*...[g]iven the diversity within the global community of women in polygamous marriages, it is extremely difficult to draw a single, unqualified conclusion as to*

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<sup>201</sup> Lori Beaman addresses this question directly in 'Is Polygamy Inherently Harmful?' in Calder and Beaman (n 6) 2. For additional commentary in this context see also Sigman (n 78).

<sup>202</sup> Angela Campbell (n 166) with the objective of enhancing public debate on gender equality and bringing that debate to bear on policy development, and asks for the issues to be viewed more closely and outside of the usual rhetoric, with a focus on women's actual experiences of both polygamy and its regulation.

*how women experience polygamy. While some women might suffer socially, economically and health-wise as a result of polygamous life, others might benefit.*<sup>203</sup>

Applying the contents of that report to the issue of the Canadian government's response to polygamy, Professor Campbell recommends a more nuanced response to the multifaceted experiences of women who are in plural marriages.<sup>204</sup> She provides support for that suggestion in her criticism of the usual normative focus on gender equality concerns and religious rights, repeatedly recommending a more rigorous examination is needed of "polygamy's actual implications for plural wives, and ... awareness of the lived experiences of [women in polygamous communities]." While the report does not comment on polygamy and harm *per se*, Campbell does draw a link in her research to the act of criminalising polygamy and the hardship this causes, most often to the women it is intended to protect. Campbell's interviews with members of the Bountiful community reveal, whether or not criminal prohibitions are strictly enforced, women feel stigmatised by the moral expression of criminal sanction, and experience hostility and intolerance as a result.<sup>205</sup> Whether or not criminal sanctions are implemented, Campbell's research suggests it is wise for any debate regarding polygamy not simply to assume it is a practice that is always hostile to women and children within the ordinary critical framework.<sup>206</sup> Rather than simply accepting the "situated knowledge of the golden few" who, she says, we assume stand on a morally prominent high ground with all the

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203 Campbell (n 166) 10.

204 Campbell (n 166) 10.

205 Campbell 'Bountiful's Plural Marriages' (n 6) where she invites the reader to view the community of Bountiful in a way which is not automatically associated with coercion. While her paper is not intended to comment on harm *per se*, she does discuss the concern over harm with polygamy in some detail and her article presents the Bountiful community in a less patriarchal and unequal light, offering insight into the impact doing so might have on formal, juridical approaches to polygamy as a result.

206 The reasons for the hostile assumptions regarding polygamy are explored in Elizabeth Emens (n 9) where the author investigates why, when marriage involving different sexes is being discussed so willingly, is marriage involving different numbers of people still so widely assumed to be undesirable, particularly when people practice so many alternatives to monogamy in the form of either adultery or serial polygamy (divorce and re-marriage). Emens focuses on polyamory, or less formal multi-partnered relationships in her study, asking whether objections to it are because it is associated with the more patriarchal, historic notions of polygamy, and what consequences the current approach has in terms of marriage, divorce, custody, property sharing, etc. Emens cites norms and law which urge people (in the West at least) strongly towards monogamy, and which pressure anyone with non-monogamous aspirations to keep them to themselves, irrespective of the fact they may be beneficial and not harmful to the people involved. To this end, similarly to the recommendations put forward by Adrienne Davis (n 9) Emens recommends laws prohibiting things like polygamy or adultery become default rules which parties can contract out of, if they so wish. See also Faucon 'Marriage Outlaws' (n 87) on effective regulation of religious polygamous marriages in the West.

authority that entails, it is important that the realities of women's lives are discussed. Campbell is eager to ensure that the true source of any hardship women experience is exposed, faced and responded to appropriately—a suggestion which is built on later in this work not only in the context of domestic legal responses to polygamy but also with regard to its treatment in human rights and feminist theory.<sup>207</sup> Rather than assuming polygamy is universally harmful, without any additional consideration of women's context or experience, Campbell suggests government policy would be more effective if targeted specifically at factors which are detrimental to women (such as abuse, poverty, coercion, ill health, etc.), and not so rooted in universal objection.<sup>208</sup>

Focusing on the fundamentalist Mormon community in North America, Emily Duncan has also reasoned that public reaction to raids on Mormon compounds as well as anti-polygamous legislation have served only to drive polygamy underground and cause more harm, because the authorities are less capable of investigating actual harms that occur, including forced marriage, underage marriage, incest, rape or other violence or welfare fraud.<sup>209</sup> In asking the reader to re-consider the prohibition of polygamy on the basis of harm, Duncan draws an interesting comparison between alcohol prohibition and plural marriage. She cites the prohibitive approach of teetotal President, John D. Rockefeller, who supported the repeal of the ban on alcohol because he believed it led to an increased disregard for the law, which ultimately drove the consumption of alcohol underground and exacerbated its negative effects.<sup>210</sup> According to this reasoning, more effective regulation is needed; regulation which reflects the practical realities of polygamy, rather than a public policy which adopts an assumed morality and is not effective at all at preventing harm in practice. Duncan is of the view that legalising polygamy will bring polygamous communities into the open and promote collaboration between polygamist families and the state, which will reduce abuse and enable the authorities to prosecute crimes more easily. To this end, she recommends the state focus

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207 Angela Campbell 'Bountiful's Voices' (n 6) 60 where she quotes Matsuda 'Pragmatism Modified and the False Consciousness Problem' (1989-90) 63 S. Cal. L. Rev. 1763, at 1764.

208 Campbell (n 166) 11.

209 Emily J Duncan (n 73) 332 "Thus, if there is to be a rational policy in this area, it should consider the legalization of polygamy, thereby allowing greater regulation of the practice, compelling polygynous communities to emerge from the shadows, and openly assisting the women and children who live in them."

210 Duncan (n 73) 315.

on the real crimes, not the apparent crime of culture. In her view, unless such changes occur, polygamists will be left to practice polygamy in whatever way the most dominant among them wants.<sup>211</sup> Increasing numbers of authors are supporting the more thoughtful approach to polygamy suggested by Campbell and Duncan, lamenting:

*... the disconnect between the empirical reality of polygamous practice, on the one hand, and legal policy and law enforcement, on the other, has emphasized imagined harms at the expense of existing harms-or even state-created new ones.*<sup>212</sup>

In this regard, the social surroundings for the practice of polygamy are elevated in considerations about harm. Whether there is gender equality, or not, depends more on formal responses to polygamy which avoid ‘smuggling in’ assumptions that render it helplessly harmful.<sup>213</sup> Once the possibility for redemption is accepted, the recommendation which most often flows as a result is that polygamy at least be decriminalised, allowing the state to focus on more useful, direct measures to prevent the commission of crimes often associated with its practice.<sup>214</sup> The morality arguments so heavily relied on in early case law and still cited today by conservative judges regarding the threat that polygamy poses to community well being are being relied on less and less. Further, so far as equality and rights arguments are concerned, more and more, women’s rights are viewed as better served by recognising polygamy, than

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<sup>211</sup> Duncan (n 73) 334.

<sup>212</sup> Sigman (n 78).

<sup>213</sup> Cheshire Calhoun, ‘Who’s Afraid of Polygamous Marriage’ (2005) 42 San Diego Law Review 1023, 1039, where she says whether or not polygamy is unequal for women depends very much on the form of ‘social practice’ that polygamy takes. “The customary social practices associated with polygamy help determine the degree of gender equality, mutuality, and individual autonomy versus unilateral dominance and gender inequality that is likely to occur...” Calhoun refers to Nancy Rosenblum who suggests something along the lines of Adrienne Davis in terms of regulation where she says, “There is no reason why egalitarian norms of property distribution, parenting and the division of domestic and market labour recommended by democratic theorists could not be adjusted for plural marriage.” Calhoun also says the legal form of polygamy matters to equality outcomes, and in this regard she says it would have to be recognised as valid for same sex polygamous unions for example. Calhoun’s concern is with objections to polygamy being based on assumptions which ‘smuggle in’ a whole host of other assumptions about the background social conditions for women which render polygamy unequal.

<sup>214</sup> A wide range of views on the effective regulation of polygamy is provided in Bennion and Fishbayn Joffe (eds) (n 7) including an additional discussion on the relative downsides and benefits of polygamy for women in Debra Majeed, ‘Ethics of Sisterhood; African American Muslim Women and Polygyny’ at 85. An economic account of the effect on women is provided at Shoshana Grossbard ‘An Economist’s Perspective on Polygyny’ at 103.

not.<sup>215</sup> So much is the tide beginning to turn with regard to polygamy and traditional approaches to the management of perceived harms in the West, one commentator has called the notion that monogamy is somehow superior both sociologically false and smug, paving the way for voices of those who offer alternative methods of polygamy regulation to be audible.<sup>216</sup> Among them, commentators like Adrienne Davis not only suggest innovative and effective methods for regulating polygamy, in a direct response to the ordinary discourse on harm, they contend that to not do so is bad for liberal democratic societies and values.<sup>217</sup>

It is undoubtedly the case that women's experience of polygamy is varied—whether women have a positive experience is very often more dependent on the socio cultural context of a plural marriage and the family relationships within her particular family unit, than the plural nature of the marriage itself, and whatever the depth and breadth of formal disapproval, for some women, polygamy is a positive experience.<sup>218</sup> In societies where being unmarried is

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215 Sarah Song in 'Polygamy Today A Case For Qualified Recognition' in Bennion and Fishbayn Joffe (eds) (n 7) 199.

216 Stephanie Forbes, 'Why Have Just One? : An Evaluation of the Anti-Polygamy Laws Under the Establishment Clause' (2003) 39 Houston Law Review 1517.

217 Davis (n 9), 1585.

218 In particular the report by Angela Campbell (n 166) where she concludes that women's experiences of polygamy vary widely and according to context. Angela Campbell continues her analysis in 'Bountiful's Plural Marriages' (n 6) 343, where she explores marriage more generally in the Bountiful community, dispelling a range of myths about communities that practice polygamy and showing a wide range of polygamous (and other) marriage experiences, including same sex polygamy, taking place in a community which is largely presented to the outside world as one where patriarchy and coercion dominate marriage practices, even if her paper does not seek to reach a firm normative conclusion about polygamy. Emily Duncan (n 88), also picks up on the idea that polygamy is not all bad, quoting one FBI agent familiar with polygynous sects saying, "At least 99% of all polygamists are peaceful, law abiding people, no threat to anybody. It's unfortunate that they're stigmatized by a band of renegades" (quoting Bella Stumbo "No Tidy Stereotype; Polygamists: Tale of Two Families, LA Times, May 13, 1988 Part 1 at 1). Sigman (n 78) 143 describes the conventional suggestion that polygamy is always harmful as 'over simplistic' saying, "... Polygamy can certainly be oppressive and patriarchal—a system that cabins women into prototypical gender stereotypes while denying them fundamental rights. Yet polygamy, in other contexts, can be communitarian and inclusive, allowing women greater participation in the economics and social structure of the family unit." Her suggestion is supported by Elizabeth Joseph, herself a well known polygamous wife and professional career woman, who has described polygamy as "an empowering lifestyle which provides her with "... the environment and opportunity to maximize by female potential without all the trade-offs and compromises that attend monogamy" (Las Vegas Sun (n 162). See also Bennion (n 162). Finally, Sonja van Wichelen 'Polygamy Talk and the Politics of Feminism: Contestations over Masculinity in a New Muslim Indonesia' (2009) 11(1) Journal of International Women's Studies: Gender and Islam in Asia, 178 canvasses the range of views on women who practise polygamy in Indonesia, with some women who see it as their pious duty, some who prefer it to men committing adultery or prostitutes, and others who are highly educated and career driven who, even now, will choose polygamy over monogamy because of the freedom it gives them, like Joseph in the North American setting.

shameful, or where an unmarried daughter is an unmanageable economic burden, polygamy may offer a solution which is capable of improving women's lives by offering stability for them and their families.<sup>219</sup> And it is not just poorer families who have the potential to benefit from a polygamous marriage. Educated women who have no wish to be materially dependent on their husbands but who wish to be married and have a family may choose to be in a polygamous marriage because it suits them by providing an arrangement which allows them the time to be successful in their career and be involved in a family life.<sup>220</sup> Far from being compromised, these women are empowered by their polygamous marriage, because it allows them more freedom and independence than they might ordinarily experience in a monogamous relationship. In addition, other women will feel supported by the emotional and practical support a positive co-wife experience may offer.<sup>221</sup> Alternative theories of harm are emerging—theories which denounce typical morality, liberal equality, human rights and feminist objections, and which increasingly demand that Western and prohibitive states reconsider their selective disapproval for plural forms of marriage.

### 2.6.2 The Impact of Not Rethinking Harm

The suggestions made by Campbell, Duncan and others like them are given practical resonance in the context of the French ban on polygamous marriage, which was ruthlessly imposed and implemented. French authorities had initially been accommodating of large numbers of migrants and refugees who had arrived from former colonial outposts and settled over a long period of time, so much so that as many as 140,000 polygamous families were thought to exist in France in the years preceding the introduction of a ban.<sup>222</sup> In 1993 the permissive French approach towards polygamy among migrant communities was peremptorily withdrawn when

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219 Gaffney-Rhys, Ruth, 'Polygamy and the Rights of Women' (2011) Vol 1 Women in Society 2, 8

220 Las Vegas Sun (n 162) and van Wichelen (n 218) and Gaffney (n 219), 7 where she mentions Mary Potter and Elizabeth Joseph, who make this argument.

221 This is especially true of the Masai, Kung and Mende peoples of Africa, where co-wives consistently report positive feedback of their polygamous marriage experience, Gaffney (n 219) 7.

222 Zeitzen (n 73) 166.



the '*Loi Pasqua*' was introduced.<sup>223</sup> The law, so named after the French government minister who was responsible for introducing it, banned polygamy outright and prevented husbands from living with more than one wife, with the intention of eradicating the harmful practice of polygamy among migrants living in France. It also outlawed family reunification for polygamous families, preventing co-wives from joining husbands.<sup>224</sup> While outright bans on polygamy in North America have largely been ignored by authorities in the absence of evidence of other, tangible harm, in France the *Loi Pasqua* was enforced to its fullest extent with devastating consequences for those who were affected. Men in polygamous families were required to divorce additional wives and plural wives were required to leave their family households. The law also applied not only in the future for anyone coming to France, but retroactively as well, so that anyone already living in France was affected. The penalty for any failure to comply with the *Loi Pasqua* was the loss of the right to stay and to work, with the ultimate penalty for non-compliance being deportation. This caused families who had previously been living legally in France to split up or lose their work and residence permits. The *Loi Pasqua* and its unforgiving enforcement caused much harm to Muslim migrant families, and particularly to women and children.<sup>225</sup> The brutal implementation of the law caused hardship and distress to wives who were forced to be without their husbands and very often also without any financial support whatsoever. This resulted in many women who were made to divorce their husbands being left with nowhere to live and no support, while additional wives expecting to join their families were also denied that opportunity. As a result,

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223 '*Loi Pasqua*' (1993) Ordonnance n° 45-2658 du 2 novembre 1945 bis, 30, as inserted/amended by Loi 93-1027 du 24 août 1993, Arts 9, 23. *Loi Pasqua* provides: "Art 9 There is inserted, in the aforementioned ordonnance n° 45-2658 du 2 novembre 1945 précitée, an article 15 bis in the following terms: "Notwithstanding arts 14 and 15 [of ordonnance 45-2658], a carte résident may not be issued to a foreign immigrant in a polygamous state nor to the relatives of such immigrant. Any carte résident issued in contravention of these provisions is withdrawn. Art 23 There is inserted into a Chapter VI in the following terms: Of family reunification; Art 30 Should a polygamous foreigner reside in French territory with a first spouse, the benefit of family reunification may not be granted to any other spouse. Save that [i.e. unless] such other spouse is deceased or deprived of parental rights, nor shall his or her children benefit from family reunification. The [right to remain] obtained by another spouse shall be refused or withdrawn as the case may be. The [right to remain] of a polygamous foreign immigrant who has caused to accompany him more than one spouse, or children other than those of the first spouse or those of another spouse who is deceased or deprived of his or her parental rights, is withdrawn."

224 *Loi Pasqua*

225 Angela Campbell Status of Women Report (n 166) 18. See Charsley and Liversage (n 167) 19 referring to the French policy and the hardship caused, they cite Zeitzgen (n 73) 165.

the ban on polygamy in France caused a greater level of harm to polygamously married wives and their children than any harm which might have been caused by polygamous marriage.

The French example is important because it illustrates starkly an occasion when the putative aim of prohibitive states in banning polygamy bears little correlation to its effect in practice.<sup>226</sup> Here, the comments of those in favour of a more productive and fair engagement with polygamy have meaning. However, despite the outcome in France and the suggestions of those who endorse a more permissive approach to the practice of plural marriage for the sake of preventing harm, it is the views expressed in the report by Cook and Kelly which continue to reflect the dominant view of polygamy in prohibitive jurisdictions.<sup>227</sup> In Western states it is easy to find support for the more conventional view of polygamy as so harmful as to necessitate its universal prohibition. The *Bountiful* case illustrates this prevailing view in action. Here, as so often, harm was the central concern, and the Court elevated that association between the practice of polygamy and harm above the hardship often suffered by a universal ban in practice.<sup>228</sup> Whatever the reality, the core objections that are often used to promote this approach—including the fact that polygamy represents and promotes a patriarchal family form, it is harmful to women and threatens host society values—are seemingly automatically adopted. One Canadian commentator, Lori Beaman, has described her alarm at this process, saying:

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226 In addition, measures like the *Loi Pasqua* usually fail completely to eradicate polygamy. For the practice of polygamy in France see 'Many Wives Tales' <http://www.economist.com/node/16068972/>, The Economist illustrating the 'problem' of polygamy continues since the *Loi Pasqua* was passed over 20 years earlier, estimating there are 200,000 people still living in 16,000-20,000 plural marriages across the country.

227 For additional material recommending the prohibition of polygamy see Witte (n 78), Strassberg (n 66) Bala and Bromwich (n 71) where the authors argue there are good reasons for not giving legal sanction to polygamous relationships. In the collection of reports for the Status of Women, Canada (Campbell and others n 166), in a report called 'Separate and Unequal: The Women and Children of Polygamy', while accepting plural marriage is complex and women have a range of experiences, the Alberta Civil Liberties Research Centre expresses the clear view that polygamy is likely to infringe on public and personal safety and cause sufficient harm to allow anti-polygamy legislation to be enforced.

228 *Reference* (n 75). The expert evidence of Angela Campbell, summarising her research highlighting the varied experiences of both polygamy and its regulation can be found at <<http://www.vancouversun.com/pdf/polygamy/angelacampbell.pdf>>.

*...[the] discourse of harm has stifled well-informed debate about polygamy ...  
Harm has become an impenetrable cloak around polygamy that is supported by  
public discourse, including [in] the media and [by] the state.<sup>229</sup>*

In seeking to lift the ‘impenetrable cloak’, Beaman encourages those who object to polygamy to take a closer look at the lived experiences of polygamous marriage and family life. In doing so, she laments the common, binary presentation of polygamy and those who practice it as ‘the other’, to be feared and excluded, with all of the implications that raises for the regulation of family life, particularly as our concept of the family and the make up of our society evolve. Beaman is not alone in her lamentation, either. Where absolute objections to polygamy are introduced in immigration settings, others have noted that, like unconditional prohibition of polygamy or other religious practices in the domestic sphere, unthinking, universal bans on polygamy are much more likely to cause more harm, than good.<sup>230</sup> The truth is, strict bans on polygamy have not eradicated its practice in prohibitive states. Instead, they have effectively denied polygamous wives of rights and protections, leaving them exposed and vulnerable to abuse in both domestic and immigration settings. It is the suggestion of this work that these unintended consequences of polygamy regulation provide a sound basis for questioning the logic of relying on common assumptions about harm to justify the prohibition of polygamy.<sup>231</sup>

### **2.6.3 Rethinking Harm in Practice**

In the face of strong criticism of polygamy in prohibitive states, the range of official responses to polygamy around the globe surely provides tangible scope for a legitimately wide breadth of measures to respond to concern over harm. Specifically, regarding Muslim polygamy, the different forms of regulation outlined here illustrate that Islam is neither uniform nor static, corresponding with the view that it is possible to interpret the Qur’an with a degree of fluidity and adaptability.<sup>232</sup> As outlined earlier, progressive Muslim scholars express the view that the

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229 Calder and Beaman (n 7).

230 Bailey and Kauffman in Campbell and others (n 69) 16.

231 Calhoun (n 213) 1039.

232 Kecia Ali (n 100) 627.

manifestation of Shari'a can evolve; Islamic law was not intended to be static and the terms of the laws that govern the lives of Muslims can change over time.<sup>233</sup> Muslim practices can adapt and suit the needs of modern society. If those states that take a hard line were to heed the calls of more progressive academics, this flexibility in Islam would allow scope to tailor laws truly to be effective in preventing harm. In acknowledging this flexibility, politically, it is likely always to be more difficult for Western states than for predominantly Muslim states to introduce any sort of reform regarding Islamic marriage. Nonetheless, the variation in the treatment of polygamy across permissive and combined states does provide a starting point for prohibitive states to bring polygamy within the realm of acceptability, even if that seems intolerable at first.

The work of Adrienne Davis is helpful in this regard in showing the potential to create space for an alternative discourse on the regulation of polygamy in the West.<sup>234</sup> The method she devises rejects the normative structure used by commentators like Cook and Kelly, as she distances her analysis of polygamy and harm from the more conventional approaches which focus on human rights like gender equality and religious freedom. Rather, Davis sets her sights on the problem of polygamy as one of bargaining and co-operation in a multiple party relationship, albeit in a private, rather than a corporate, setting. Davis offers a mode of regulation that recognises that polygamy has the capacity to be harmful but which focuses on regulating the harms themselves, rather than on the type of marriage. She suggests a paradigm for the regulation of polygamy that addresses harm more productively. In articulating a

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233 KK Arora, 'Polygamy: A negation of Qur'an' in Saraf DN (ed) *Social Policy, Law and Protection of Weaker Sections of Society* (Eastern Book Co., Lucknow 1986) 368-375. Also, Michele Alexandre, (n 87) where the author provides a detailed introduction to '*Ijtihad*' or the recommendation from the Prophet Mohammed that judgment be used in interpreting the Qur'an. The author suggests "Ijtihad is one of the many proofs that the basis for Islamic jurisprudence is one of fairness and justice rather than repression and injustice ...[and] ... also indicates that it is possible for Islamic reforms to remain consistent with the spirit of Islam while championing a fair application of the law." She explains many Muslims have remained closed to the possibility of *Ijtihad* since the 10th century when fears over the demise of Islam promoted a more rigid application of Shari'a. encouraging the promotion of a strict interpretation of the Qur'an and a rigid approach to day to day life. As Alexandre says "Islam, a once evolving jurisprudence, has been stifled because of the reluctance to use Ijtihad." "The Qur'an and Sunnah contain a paradigm of equality that is counter to the notions that have been implemented by Islamic traditionalists.

234 Davis, (n 9) acknowledges her work will appall some and amuse others, but her suggestions are serious and helpful and she is skilful in drawing parallels between economic and intimate relationships to apply a similar private law solution to their management. See also Faucon (n 69) and Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse University Press 1990).

method for the effective recognition and regulation of polygamy in a way which is consistent with Western, social norms, Davis provides a framework for ensuring fairness where there are multiple partners in a relationship. She bases this on the laws of commercial partnerships, proposing rules that might accommodate marriages with many wives and reduce the vulnerability risked by being a co-wife. Rather than looking to family law or human rights law to resolve harms arising out of polygamy, however, she turns to commercial partnership law, where she draws analogies and sees solutions to some of the problems of polygamy, were it to be practised openly in the West. In so doing, Davis acknowledges that no method of regulation is going to be fool proof. However, as she points out, the same can be said for any relationship and its management, including monogamous marriage for that matter.<sup>235</sup>

What Davis' work does—along with similar suggestions by other commentators—is give tangible and functional voice to the notion of regulating polygamy in states that currently abhor it, challenging traditional objections based on harm. Her practical suggestions for governance are anchored in Western models of regulation, providing the possibility of a familiar and tolerable framework to control and manage polygamy, even in the prohibitive West. Where harm may arise out of polygamy, it becomes theoretically possible for a state to introduce regulation to manage injury and balance competing harms adequately. The potential benefit is clear when the detrimental effects from simply banning polygamy and ignoring its on-going practice are considered. Very often, as Campbell and others have pointed out, this is done at women's peril. Whatever the well-meaning aims of universal bans, they are undoubtedly capable of causing more harm, than good, as the French example so glaringly illustrates.

Women in polygamous marriages in the immigration sphere are especially vulnerable to harm and also much more likely to be ignored by both states and human rights bodies which have

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235 Choudhury (n 175) confirms her view that there's no real explanation of why monogamy is modern – except perhaps an assumption because of its dyadic form – but she says this “conflates form with substance”, recalling the inequality in monogamous marriage up until very recently, with women being under the complete control of husbands under the doctrine of coverture, etc. Once married, women had little independence and came under the authority of their husbands. The preoccupation with abuse in polygamous marriages she says conveniently ignores the fact that abuse occurs and women are vulnerable in the private sphere, whatever the form of family.

little interest in immigration provisions preventing family reunion for polygamous families.<sup>236</sup> As one prominent immigration practitioner has pointed out, it is vital to question the efficacy of any measure to restrict polygamy in immigration, as well as assess the extent to which that measure intrudes on the lives and rights of those affected.<sup>237</sup> That interference must be assessed by asking how crucial are the rights that are breached, and how severe is the day-to-day impact on those women affected? As this work will attempt to show, in the context of migration claims for refugee families, the unintended consequences of banning polygamy are severe. The unconditional rejection of polygamy in immigration amounts to an unforgivable official abdication of concern for injury caused to displaced polygamous women. Further, as this chapter has aimed to show, oblique references to ‘harm’, whether to women or society at large, or by referencing human rights standards or feminist discourse, may no longer be enough on their own to prop up that policy of neglect.

## Conclusion

Plural marriages have been possible for many centuries. Although they may historically have been practised by a diverse collection of faiths and cultures, the most common type of polygamy nowadays is that which is practised by Muslims and sanctioned by the Qur’an. In that connection, while an association between polygamy and harm is likely to have been made in the first instance because of the disjuncture between Christian and other religious or cultural practices, objections to polygamy on the basis of perceived harm are now most often associated with concern over the threat to liberal values, particularly gender equality. The strict regulation of polygamy is often justified on the basis of a direct link between plural marriage and the injury it causes to co-wives. Although commentators who question this view are increasing, the orthodox absolutist approach to polygamy—certainly in the West—is that it is universally bad for women, and as a result, must be abolished. Indeed, this view of polygamy is common to a divergent collection of critics, be they conservatives whose views are grounded

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236 Helena Wray *Regulating Marriage Migration* (Routledge, London 2011) supports this suggestion, saying the treatment of marriage is especially important in immigration, a context where “... other competing interests can easily be downplayed.” 15, 16.

237 Wray (236) 15, 16 has a very useful discussion on how to deal with regulating marriage migration where a harm is perceived, she says this type of analysis can never take place in a cultural vacuum, and can’t be avoided.

in moral objections to the practice of polygamy, or supporters of liberal values who fear its practice threatens the very fabric of Western society. Those who promote transnational human rights standards have also widely condemned polygamy because it is considered inherently unequal and likely to breach women's rights. Traditional, equality feminists share similar views, based on concerns over both dominance and gender inequality.

The widespread legal regulation of polygamy, even in states with a more permissive and accepting approach to its practice, is perhaps illustrative of this strong link with harm. Alternatively, such regulation might also be used to argue that polygamy, like any other intimate relationship, has the capacity to be manipulated and to be harmful, and just like other marriage practices, it may also be regulated to reduce the potential for harm to be caused. The fact that Muslim polygamy is commonly regulated in some, even permissive, states illustrates its potential for adaptation—that there isn't simply one way to be in an Islamic polygamous marriage—and that it is possible for polygamous marriages to take account of modern rights-based and feminist concerns. Moreover, as Adrienne Davis tells us, the possibility of a regulatory framework already exists in the corporate legal vernacular, already accepted in the West. And as unconditional and strict prohibition in France has so tragically shown, conventional objections to polygamy which lead to its exclusion may result in outcomes which reveal much about the impact of such strict prohibition on women, and the real motivation for laws prohibiting plural marriage. As the experiences of Muslim co-wives following the introduction of the *Loi Pasqua* so damningly show, women are not always protected by a complete ban on polygamy. In fact, such bans themselves have the potential to cause great hardship.

Despite that, the feminist and human rights orthodoxy is that the inherently unequal nature of polygamy cannot be consistent with superior liberal values. While polygamy is not expressly prohibited in any human rights charter, the international human rights community has confirmed without equivocation its view that polygamy breaches a wide range of human rights instruments, calling for its abolition. Polygamy also offends conventional liberal and dominance feminist aims. On the face of it, the practice of polygamy is simply incompatible with equality and therefore objectionable in the West. However, it is also clear from more recent legal and academic commentary that universal polygamy bans are increasingly being

called into question and that a more detailed evaluation of harm is being called on to replace the usual conservative, liberal, human rights or feminist basis for determining laws and policy on plural marriage.

It is to the consideration of harm and polygamy in the domestic British setting that this work now turns, and to an examination of inconsistencies in the legal treatment of polygamy with particular focus on displaced polygamous families seeking reunion, for whom any formal balancing and determination of harm is crucial.



## **Chapter 3**

### **The Contradiction: Polygamy in the United Kingdom**

#### **3.1 The Scope of this Chapter**

This chapter is about the treatment of polygamy in the United Kingdom. The first part examines the domestic legal approach to polygamy, where harm is more often balanced, and the approach to polygamy in immigration, where relative harms are not considered and polygamous marriages do not provide any entitlement to immigration rights. Questions of harm are considered specifically in the British context as inconsistencies in the state's formal response to polygamy are exposed. As this chapter aims to show, the state's approach to polygamy has never been—and continues not to be—uniform. The second part of this chapter explains why these different approaches to polygamy matter. This chapter reflects on whether the unqualified rejection of polygamous spouses is acceptable in the refugee context, in particular, when banning polygamy is likely to have harsh outcomes for wives denied entry. The chapter concludes by suggesting that immigration laws which ban additional wives be reconsidered, to take account of women's experiences of harm.

#### **3.2 The Validity of Polygamous Marriage**

##### **3.2.1 Domestic Polygamous Marriage**

The United Kingdom is considerably more relaxed about purely religious polygamy and informal multiple-party co-habitation than other prohibitive jurisdictions, such as Canada and the United States of America, where even informal plural relationships constitute a criminal act. Despite that, neither men nor women are permitted formally to marry more than one person in Britain.<sup>238</sup> In addition to this civil prohibition on non-dyadic marriages, legislative

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<sup>238</sup> Matrimonial Causes Act 1973 s 11(b). In addition, parties who knowingly give false information regarding their status to procure a marriage commit an offence, see Perjury Act 1911 s 3. See *R v Bham* [1966] 1 QB 159 (an attempted polygamous marriage which

measures have long existed in the United Kingdom that seek to punish individuals who enter into a formal, additional marriage when they are already validly married. Although the penalty is no longer death, anyone convicted of the criminal offence of bigamy now is subject to a sentence on conviction of seven years imprisonment.<sup>239</sup>

Despite the long legal disapproval for non-monogamous marriage, polygamy is undoubtedly practised in the United Kingdom, and increasingly so.<sup>240</sup> Moreover, where polygamy occurs, it is not just practised by older, first generation Muslim migrants who arrived on earlier waves of economic migration in the boom post-war years. Younger Muslims, many of whom have been born and raised in the United Kingdom, are also entering into plural marriages.<sup>241</sup>

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becomes void and *Hyde v Hyde* (n 109) 130, 132 where the idea of marriage as a voluntary union between two people to the exclusion of all others, is firmly stated and reinforced.

239 Offences Against the Person Act 1861.

240 As already discussed, domestic polygamy is very hard to detect because it is carried on without state engagement. Formal statistics are not available on the number of polygamous marriages in the United Kingdom, as confirmed in Catherine Fairburn, House of Commons Library, Briefing Paper 'Polygamy' No 05051 (6 January 2016) where the Director General for the Office for National Statistics confirms such information is not readily available. The marriage register is used to gather statistical information on marriages and polygamous marriages are not registered in this way (either because they are foreign marriages or they are only religious marriages). Neither is the information available from any other survey data. Various news publications have speculated on the numbers however, and it has been suggested that as many as 20,000 unregistered polygamous families and up to a 1,000 foreign, valid polygamous marriages currently exist in the United Kingdom today. For reports estimating the numbers of polygamous families in the United Kingdom see variously Rachel Stewart and John Witte (n 88); 'What's Wrong with Polygamy?' *BBC Radio Asian Network Reports* (26 September 2011) <<http://www.bbc.co.uk/programmes/b0153rzs>> accessed 10 February 2015, discussing the numbers of polygamous marriages increasing, which refers to the Islamic Shari'a Council in Britain (an organisation which provides advice on Islamic principles and law, it describes itself as being comprised of members from all of the major schools of Islamic legal thought, and widely accepted by Muslims living in Britain as an authoritative body with regard to Islamic law) having received 700 applications in 2010 citing polygamy as one of the main reasons for wanting a divorce; Rosie Kinchen, 'Muslim high flyers share a husband: A shortage of eligible men is driving thousands of women to become co-wives' says Rosie Kinchen' *The Sunday Times* (11 March 2012) <<https://www.thetimes.co.uk/article/muslim-high-flyers-share-a-husband-rd26bsc7l3z>> accessed 13 April 2017. See also Pearl & Menski (n 98) who refer to the fact that, even in Britain today, Muslims claim the right to polygamous marriages. See also *Women Living Under Muslim Laws* (Report, n 142) 24, which refers to existence of polygamy in the UK and cites the example of a man who brought a second wife back to the UK where he lived between two homes and maintained relations with both women.

241 Jonathan Djanogly, then Junior Minister at the Ministry of Justice, HC Deb 12 October 2011 c402W "...[there is] anecdotal evidence of people entering into polygamous marriage in the UK through religious ceremonies that are not registered by the state and are not recognised under UK law. Due to the fact that these marriages are not legally recognised there is no indication of how many such polygamous relationships exist. Any parties to such relationships do not share the same rights as a legally married couple, such as access to financial remedies available on divorce or inheritance rights on the death of one of the spouses, and are treated as cohabitants. The Government have carried out some work with the Muslim community to encourage mosques to undertake the civil aspects of marriage."

Because concurrent, civil marriages are prohibited in Britain, Muslim men who marry here polygamously do so in private, without attracting the attention of the state. This is achieved by entering into a second marriage which is solely religious, called a '*Nikah*', and which is not formally registered with state authorities.<sup>242</sup> *Nikah* are not civil marriages recognisable in the ordinary way and additional *nikah* may be entered into according only to religious convention, without any state involvement. The parties are treated for domestic purposes as cohabitants, without spousal entitlements in civil law.<sup>243</sup> As a result of their legal anonymity, religious plural marriages are difficult to assess in terms of their number, although available estimates suggest these marriages are rising, not declining.

It is perhaps curious that young Muslims in the United Kingdom are today opting to enter into polygamous marriages. The reasons for this trend are varied and are likely to include a desire on the part of those involved to appease family members by agreeing to an arranged marriage, while at the same time, satisfying a desire to find a 'love match'.<sup>244</sup> A desire to avoid the shame associated with divorce may also be a prompt for these marriages in the United Kingdom. Because marital break-ups are generally viewed negatively among Muslim societies, opting for polygamy may be seen as a more attractive alternative to divorce for all concerned.<sup>245</sup> Polygamy may also be sought in modern Britain as a solution to infertility (whether or not the absence of children is due to the infertility of the woman involved).<sup>246</sup> While this research is not concerned primarily with polygamy in the domestic sphere, and whatever the reasons for the beginnings of a rise in polygamous marriage in the United Kingdom (among other European and North American nations), the continued formation of polygamous marriages in the United Kingdom lends weight to the view that those who practice

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242 Zeitzen (n 73) 5, a *nikah* ceremony is not legally valid and Zeitzen explains that often second marriages are religious or customary, so that they may not be included as 'marriages' for the state's purposes.

243 Collins et al (eds) *Dicey Morris and Collins on the Conflicts of Laws* (14th edn Sweet & Maxwell, 2006) 254, Rule 31, "a marriage celebrated in England in accordance with polygamous forms and without any civil ceremony as required by English Law is invalid, whatever the domicile of the parties." In the USA and Canada informal co-habitation is a crime, that approach having arisen in response to domestic, Mormon polygamy. The same bans also exist in Germany and France but the United Kingdom legal system is largely unconcerned with informal cohabitation and laws regulating relationships are pre-occupied with governing traditional formal marriage, same sex marriage, and regulating bigamy.

244 Charsley (n 166) 10.

245 Charsley (n 166) 10.

246 Charsley (n 166) 10.

polygamy have little willingness to abandon their religious laws and customs. This is true whatever the formal approach to plural marriage in the United Kingdom, be it prohibitive or permissive, a fact which Western governments may increasingly be forced to acknowledge and engage with, as young, modern Muslims with dual aspirations increasingly consider the benefits of polygamy.<sup>247</sup>

### 3.2.2 Foreign Polygamous Marriage

Where a marriage takes place outside of England, establishing the English legal system's approach to validity is more complex. Because separate legal systems are engaged, the legal validity of a marriage is governed not only by domestic law in the United Kingdom, but also by the law in other jurisdictions and rules relating to conflicts of laws regarding the dominance of one law over another. The starting point to determine the validity of a marriage with an international element is the '*lex loci celebrationis*' rule: that is, the validity of the marriage is determined according to the law of the country in which the marriage is celebrated. Provided a marriage with an international element is conducted in accordance with the law where the marriage takes place, it will attract formal validity and may be recognised in other jurisdictions as a legitimate marriage.

The application of *lex loci celebrationis* applied up to the middle of the nineteenth century. From the mid-1800s onwards the British response changed, however, and a new and much less welcoming judicial approach was taken to foreign polygamy. In *Hyde v Hyde*, a British citizen who had entered into a Mormon marriage and subsequently renounced his faith petitioned the

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247 Sona, Federica 'Polygamy in Britain' Osservatorio delle Libertà ed Istituzioni Religiose, (Newsletter) n 33/2005 July 2005 <[http://www.olir.it/areetematiche/104/documents/Sona\\_Polygamy\\_in\\_Britain.pdf](http://www.olir.it/areetematiche/104/documents/Sona_Polygamy_in_Britain.pdf)> accessed 11 April 2017, 2 in which she says the abolitionist policies and assimilationist aims of the British government have not prevented polygamy being practised here. In her view "....ethnic minorities have no intention of abandoning their religious laws and customs". Ahsan (n 96) 30, also talks about the pressure on Muslims in the West and says that despite it they have "... by and large been able to hold fast to their values and traditions." Charsley and Liversage (n 166) 10 say their research in Britain and Denmark reveals that transnational polygamy is also on the increase, and not only among migrants but also for younger Muslims which they also put down to effort to appease the family with a suitable marriage and at the same time find a love match. They describe such marriages as 'dual aspirational' and say it is not particular to traditional, old minorities and is present as part of the modern Western Muslim community.

court in England for divorce.<sup>248</sup> He had returned to live in England without his wife and she had later re-married, giving rise to the claim of adultery, so that a divorce ought to have been available. However, the judge in *Hyde* expressed concern because the union was ‘potentially polygamous’ having been carried out according to Mormon marriage rites, which at the time permitted plural marriage. Because the marriage was potentially polygamous it was treated as actually polygamous by the judge, and was not recognised as valid, and for that reason no divorce could be granted. In this case, although the marriage was valid elsewhere, because it was also potentially polygamous as a Mormon union, the English judge expressed the view:

*... if the compact of a polygamous union does not carry with it those duties which it is the office of the marriage law in this country to assert and enforce, such unions are not within the reach of that law.*<sup>249</sup>

The ruling in *Hyde* was the first to place limits on the availability of relief for otherwise perfectly valid polygamous marriages in the United Kingdom. This blanket rejection of plural (and potentially plural) marriages persisted as the stated legal position in Britain for many years, until the publication of a report on polygamy by the Law Commission in 1972, which objected to the complete denunciation of matrimonial relief for individuals in polygamous marriage because doing so causes unnecessary harm.<sup>250</sup> Notwithstanding the state’s public policy concern not to encourage polygamy, the Law Commission expressed a strong preference for a change in approach because of the harm caused in rejecting valid foreign marriages outright.<sup>251</sup> At the same time, the Commission did re-state the importance of assimilation for

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248 *Hyde v Hyde* (1866) LR 1 P&D 130. For a discussion on Lord Penzance’s description of marriage, and whether modern judges ought to be constrained by it, see Rebecca Probert ‘*Hyde v Hyde*: defining or defending marriage?’ (2007) 3 Child and Family Law Quarterly 322.

249 *Hyde v Hyde* (n 109) 137.

250 Law Commission, ‘Family Law Report on Polygamous Marriages’ (Law Com No 42, 1971) 35. In one case affected by the rule established in *Hyde*, a child was denied the right to succeed to her father’s property because his marriage with her mother was carried out according to the customs of the Barlong people, which permitted polygamy, even though the marriage was only ever monogamous.

251 Law Commission (n 250) 11 “Something is gravely wrong when learned and humane judges are compelled by ancient authority to come to a conclusion which manifestly shocks their sense of justice.” At 13, paragraph 35(a) the Commission also says “Family relationships validly created under a foreign system of law should be recognised here, unless there are compelling reasons of English Public Policy to the contrary.”

newcomers who practiced polygamy and the balancing act the state was required to carry out, saying

*... it is rightly argued that immigrants to England are not in a privileged position and are expected to conform to English standards of behaviour. However, it seems to us that parties to polygamous marriages are more likely to conform to English standards if English law imposes on them, so far as is practicable, the same family rights and obligations as are imposed on other married people. The denial of all relief cannot achieve any change in the standards of behaviour of people who have made their home in England. On the contrary, denial of relief not only permits parties to escape from their obligations, lawfully entered into under another legal system, but tends to perpetuate the polygamous situation because the marriage cannot be ended.*<sup>252</sup>

### **3.2.2.1 Foreign Polygamy by Domiciles**

The government responded to the Law Commission's concerns by enacting the Matrimonial Proceedings (Polygamous Marriages) Act 1972, later replaced by s 11(d) of the Matrimonial Causes Act 1973, the effect of which was to allow anyone coming to the United Kingdom to adhere to their personal and religious laws with regard to marriage, provided any polygamous marriages took place outside the United Kingdom and neither party was domiciled here. The passing of the Acts confirmed a softening in the state's position on polygamy in response to the Law Commission's concerns. In practice, while neither Act allowed for the celebration of polygamy in the United Kingdom, or permitted anyone domiciled in the United Kingdom to enter into a valid polygamous marriage, the new legislation meant that a party to a polygamous marriage could now claim marital rights and enforce obligations in English courts. This

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<sup>252</sup> Law Commission (n 250) 14, paragraph 38.

allowed the state formally to acknowledge that not recognising polygamy in some circumstances would cause unreasonable harm.<sup>253</sup>

However, while the statutory response to the hardship caused by *Hyde* was undoubtedly progressive, it added its own complexity to the response to polygamy with a foreign element because it continued to restrict migrants who were English domiciles from entering into valid polygamous marriages. According to the new legislation, any polygamous marriage entered into—even outside the United Kingdom—when either party at the time of the marriage was domiciled here would still be considered void.<sup>254</sup> The new focus on the question of domicile made the determination of validity for a plural marriage more complicated because the exact nature of domicile can be difficult to determine. It is not simply a case of where one resides which is determinative. Further, the reach of the legislation meant that potentially polygamous marriages entered into by domiciles, not only actually polygamous marriages, were still subject to restrictions. The impact was to make void all marriages carried out according to marriage rites permitting plural marriage where a British domicile was involved, a position which was arguably not only unjust, but meaningless in restricting the harm thought to arise from a plural marriage. Although the United Kingdom's approach to polygamy was more open to a degree, the response to polygamy continued to cause hardship for many people living here who had been married according to a system which permitted polygamy, whether they were in actually polygamous marriages or not.<sup>255</sup>

The harm caused by the formal treatment of polygamy was considered in the early 1980's in the case of *Hussain v Hussain*.<sup>256</sup> The Hussains' marriage had been conducted in Pakistan

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253 s 11(d) Matrimonial Causes Act 1973, where the proper law to apply is the foreign law, a polygamous marriage should be considered valid, which is confirmed in Nigel Lowe and Gillian Douglas *Bromley's Family Law* (OUP, 2007) 75, where they state the overriding principle that a foreign rule of law must be applied instead of the English rule when the conflict of laws so requires.

254 The Matrimonial Causes Act was not retrospective, however, and applied only to those marriages contracted after 31 July 1971. Note, s 11(d) is not a conflicts rule, but a rule of English domestic law and it applies if, according to the application of conflicts rules, English law applies.

255 Sonia Harris-Short and Joanna Miles, *Family Law Text, Cases and Materials* (OUP, Oxford 2007) 128, discusses unsatisfactory judicial attempts to mitigate the harm from this rule. The Law Commission recommended law reform, including to make a potentially polygamous marriage contracted by someone domiciled in England and Wales valid Law Commission, 'Private International Law: Polygamous Marriages; Capacity to Contract a Polygamous Marriage and Related Issues' (Law Com No 146, 1985).

256 *Hussain v Hussain* (1983) Fam 26, [1982] 3 All ER 369.

according to Islamic rites, with the husband domiciled at the time of the marriage in England and the wife in Pakistan. The parties lived in England following their marriage and later separated. Mr Hussain attempted to use the Matrimonial Causes Act to argue their marriage should be considered void in an attempt to deny his wife any relief arising out of their parting. To that end, he argued the marriage was 'potentially polygamous' under s 11(d) as he had been domiciled in England at the time of the wedding and it had been celebrated only according to Muslim rites, which allows polygamy by the husband. In responding to Mr Hussain, however, the Court deviated from the reasoning in *Hyde* and held that the Hussains' marriage could never be polygamous, even though it was a Muslim union. In an innovation designed to hold Mr Hussain to account and avoid causing harm to his wife, the Court held that a marriage might only potentially be polygamous where the parties have capacity to marry a second spouse. As capacity is dependent on domicile and in this case the husband was an English domiciliary, he was subject to the express prohibition on plural marriage in s 11(b) of the Matrimonial Causes Act and had no capacity to marry polygamously in any event. As a result, the Hussains' marriage could only be monogamous and was therefore valid, with the effect that relief was available to the parties.

While the court's decision in *Hussain* did not return the English legal approach to the pre *Hyde* days of basing legal validity simply on *lex loci celebrationis*, it did go some way to construe the Matrimonial Causes Act so as to be more forgiving of marriages celebrated according to systems permitting polygamy to make legal assistance available for potentially polygamous marriages in the United Kingdom. To avoid hardship the Court chose not to apply the strict approach to polygamy and called for a simple reading of 'domicile'. In doing so, while the Court did not go so far as to say that all potentially polygamous marriages entered into by English domiciles must be valid, it did convert a potentially polygamous marriage into an essentially monogamous one to allow for relief. Admittedly, in a novel and limited way, the Court in *Hussain* went some way in acknowledging the validity of a marriage that was conducted according to personal laws which permit polygamy so as to avoid causing harm to the wife involved. In that regard, the judgment in *Hussain* is useful in providing evidence of judicial concern in the United Kingdom over the hardship which had arisen out of earlier, more restrictive approaches to polygamy. Although the creative recognition of polygamy in *Hussain* can't reasonably be viewed as expressing more general support for polygamy *per se*, it



does illustrate the possibility of formal tolerance towards a potentially polygamous marriage to avoid harm.

Some ten years after the *Hussain* case, and following a further report by the Law Commission on the capacity to contract a polygamous marriage and associated issues, the Private International Law (Miscellaneous Provisions) Act 1995 further reformed and clarified the law.<sup>257</sup> In a move that acknowledged on-going concern, the government abolished the concept of a potentially polygamous marriage where either party to a marriage was domiciled in England or Wales. In practice, following the introduction of this Act, anyone domiciled in the United Kingdom could be validly married in a jurisdiction that permitted polygamy as long as the marriage was not actually polygamous.

However, capacity to enter into an actually polygamous marriage abroad continues in part to be determined by domicile. Where either of the parties' domicile is considered to be the United Kingdom (with the question of domicile in turn dictated either by the place in which the parties are living at the time of the marriage, or the place they intend to establish their marital home) even where they travel to a jurisdiction which does allow plural marriage, they will still lack the capacity for an actually polygamous marriage to be valid.<sup>258</sup> In this case, while the marriage

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257 Private International Law (Miscellaneous Provisions) Act 1995 s 5(1); where either party at the time of the marriage is domiciled in England or Wales the marriage is not polygamous where, at its inception, neither party has any spouse additional to the other. Accordingly, a marriage which is not polygamous, must be monogamous and under s 5(1) such marriages are not void. Law Commission, (Report) (n 255) 9, 11, where the Law Commission outlined defects in the approach to polygamy, referring specifically to *Hussain* in doing so, offering proposals for reform, including specifically that a man or woman domiciled in England and Wales or Scotland ought to have "... the capacity to enter into a marriage outside the United Kingdom which, though celebrated in a form appropriate to polygamous marriages is not actually polygamous."

258 Clarkson, CMV & Hill, J *The Conflict of Laws* (2nd edn OUP, 2002) 342; where England is the intended place for the matrimonial home, a polygamous marriage will be void even if both parties are living in an Islamic country when they marry. Judicial views on domicile are expressed most notably in *Ross v Ross* 1930 SC (HL) 1, per Lord Buckmaster; a domicile of choice is acquired by the person deciding that his permanent home for all purposes is to be the new one. Where someone intends their home to be the new one for certain purposes only, new domicile is not acquired. It is important to look at evidence in determining domicile, including relevant conduct, statements of the person in question, etc. as a whole. *Lawrence v Lawrence* [1985] 2 All ER 73, the court may look at intended family home rather than ante-nuptial domicile to determine capacity to marry. More recent case law in the immigration setting includes *Hokan Khan Omerzy v The Secretary of State for the Home Department*, 16 August 2013, Upper Tribunal (Immigration and Asylum Chamber) Appeal Number : IA/07455/2011, involving an Afghan husband and a Slovak wife and where, because of her domicile, the marriage (an additional one for the husband) could not be valid and he obtained no entitlement to residence card through EU qualified 'wife'. In *Abdin v Entry Clearance Officer* [2012] UKUT 00309]. Also, *SM v Secretary of State for the Home*

may formally be valid according to the *lex loci celebrationis*, because of restrictions on polygamy in the parties' domicile and applying the rules of essential validity, any actually polygamous marriage entered into by an English domicile will be considered invalid because English domiciles do not have the capacity to enter into a non-monogamous union.<sup>259</sup>

### 3.2.2.2 Foreign Polygamy by Non-Domiciles

This leaves the question of how plural marriage is viewed where the participants are neither marrying in the United Kingdom, nor domiciled here. While it is government policy to prevent the domestic formation of polygamous households, despite strong objections to plural marriage with a domestic component, entirely foreign polygamous marriages are considered valid in the United Kingdom.<sup>260</sup> Provided neither party is domiciled here and the plural marriage in question meets the requirements for legal validity in the country of solemnisation, a polygamous marriage entered into externally will be recognised.<sup>261</sup> In October 2011 a written answer to a parliamentary question by the Ministry of Justice representative articulated the state's position:

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*Department* [2008] UKAIT 00092 (paragraph 10) regarding an actually polygamous marriage and choice of domicile, the Court has said "It is well known that both in English law and Scots law and, indeed we understand it, the law of much of the rest of the world, it is for a person who seeks to establish that a domicile of origin has been lost and replaced by a domicile of choice to show that."

259 Fairburn (n 240).

260 Fairburn (n 240). See also Dicey (n 243) 36 "A marriage which is polygamous ... and not invalid ... will be recognised in England as a valid marriage unless there is some strong reason to the contrary." Law Commission (Report) (n 250) says this principle is confirmed in *Shahmaz v Rizwan* [1965] 1 QB 390, 397 and *Alhaji Mohamed v Knott* [1969] QB 1, 13-14 (DC). Bailey and others 'Expanding Recognition of Foreign Marriages (n 69) 7 "Common law countries have long adopted the principle that a polygamous marriage is valid by the law of the place of celebration and by each party's personal law and will be recognised for many purposes even if the marriage is actually polygamous, "[C]ommon law countries have long adopted the principle that a polygamous marriage is valid by the law of the place of celebration and by each party's personal law and will be recognised for many purposes even if the marriage is actually polygamous."

261 Fairburn (n 240) refers to a written answer of Lord Hunt of Kings Heath, a junior minister at the Ministry of Justice in April 2008 "[P]rovided the parties follow the necessary requirements under the law of the country in question, the marriage would be recognised in England and Wales. The law is drafted thus because the Government have no desire forcibly to sever relationships that have been lawfully contracted in other jurisdictions."

*Polygamous marriages cannot be legally formed in the United Kingdom. Nor is it possible for anyone domiciled in the United Kingdom to enter into a polygamous marriage abroad. Where a polygamous marriage is contracted outside the United Kingdom between parties, neither of whom is domiciled in the United Kingdom, it will be recognised.*<sup>262</sup>

Although legal recognition is limited in that it relates only to valid, foreign polygamous marriages, in practice, unless there is a very strong public policy reason to do otherwise, such marriages benefit from broad legal acceptance and justifications for not recognising them are rarely accepted.<sup>263</sup> The basis for this approach to plural marriage stems from convention relating to conflicts of law and a lack of willingness on the United Kingdom government's part forcibly to sever relationships that have been lawfully contracted in jurisdictions where plural marriage is permitted.<sup>264</sup> In that connection, entirely externally formed polygamous marriages are not only considered valid, but may also provide the basis for domestic legal entitlement, including rights to social security, matrimonial relief and inheritance.<sup>265</sup>

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<sup>262</sup> Fairburn (n 240) citing a written answer by Jonathan Djanogly, then Junior Minister at the Ministry of Justice in October 2011 (HC Deb 12 October 2011 c402W).

<sup>263</sup> Dicey (n 243) 850, Rule 73 836: "...today polygamous marriages are recognised for most purposes.", claiming there is sufficient authority to warrant generalisation in Rule 73. See *Alhaji Mohamed v Knott* [1969] QB 1, 13-14 (DC) "A polygamous marriage will be recognised in England as a valid marriage unless there is some strong reason to the contrary."

<sup>264</sup> Fairburn (n 240).

<sup>265</sup> The position regarding entirely foreign polygamous marriage is summed up in *Halsbury's Laws of England*, Conflict of Laws (Volume 19) 2011 paragraph 522: "Marriages Conducted Abroad, Recognition of Polygamous Marriages: "A polygamous marriage which is valid under the *lex loci celebrationis* as regards form and under the law of each party's ante nuptial domicile as regards capacity will be recognised in England as a valid marriage unless there is some strong reason to the contrary. During its subsistence the marriage will be held to constitute a bar to subsequent marriage in England or, probably, to a subsequent monogamous marriage elsewhere, and effect will be given to the legal consequences flowing from the marriage, such as the legitimacy of the children and rights of succession to property. The fact a marriage was celebrated under a law permitting polygamy does not preclude the English court from granting matrimonial relief or making a declaration concerning the validity of marriage." Regarding 'strong reasons to the contrary...' at footnote 4 to that passage, *Halsbury's* concludes: "There are now very few exceptions to the recognition for all purposes of a valid polygamous marriage; and a potentially polygamous marriage (i.e. a marriage in polygamous form but actually monogamous) is treated similarly." Witte (n 78) 9 considers the recognition of polygamy for domestic law purposes generally. In his article, 'Why Two in One Flesh' (n 82) he states it is usually the first wife and children who almost always get priority in marital property and inheritance cases, citing *Rampal v Rampal* [2001] 3 WLR 795 and *Whiston v Whiston* [1995] 3 WLR 405.

**Table: Timeline of Marriage Regulation in the United Kingdom**

Date	Law/Case	Validity/Recognition
1861	Offences Against the Person Act	Bigamy is a crime, updated earlier law from 1604, which itself updated much earlier laws from as early as the time of Cnut to outlaw bigamy.  This law does not affect valid foreign polygamous marriages, which are considered valid.
1866	<i>Hyde v Hyde</i>	A Mormon marriage that at the time was legal in the USA. Where a marriage is polygamous or potentially polygamous, even if it is valid elsewhere, it is no longer considered valid in the United Kingdom. No divorce could be granted.
1949	Marriage Act	The Act that largely governs and regulates marriage in the United Kingdom.
1971	Law Commission Family Law Report on Polygamous Marriages (Law Com No 42)	Recommends the current treatment of polygamous and potentially polygamous marriages following <i>Hyde</i> is unfair and harmful. Recommends the recognition of foreign marriages even if they are polygamous.
1973	Matrimonial Proceedings (Polygamous Marriages) Act 1972, later replaced by 11(d) of the Matrimonial Causes Act 1973	Polygamous and potentially polygamous marriages may be valid, as long as neither party is domiciled in the United Kingdom at the time of the marriage. If either party is domiciled in the United Kingdom, the marriage may not be considered valid, including where it is only potentially polygamous and not actually polygamous.
1983	<i>Hussain v Hussain</i>	A potentially polygamous marriage with one party domiciled in the United Kingdom is converted into actually monogamous marriages, so that relief may be granted, effectively abandoning the ‘potentially polygamous’ barrier to validity. Following <i>Hussain</i> , it is possible that only actually polygamous marriages with an English domicile involved will be considered invalid to avoid hardship (in this case, for the wife).

1988	Immigration Act and Immigration Rules	Introduced an express ban on settlement for polygamous wives, only one wife may be granted the right of abode. No exception is made in any law for refugee families.
1995	Private International Law (Miscellaneous Provisions) Act 1995	Legislates for the outcome in <i>Hussain</i> , so that anyone domiciled in the United Kingdom can be married in a jurisdiction that permits polygamy and where the marriage is not actually polygamous it will be considered valid. The legal position for actually polygamous marriages where neither party is domiciled in the United Kingdom has not changed, and they remain valid.
2004	Civil Partnerships Act	Allowing same sex couples to enter into marriage-like relationships, called civil partnerships.
2013	Marriage (Same Sex Couples) Act	Legalised same sex marriage in England and Wales.

### 3.3 The Recognition of Polygamous Marriage

It is important to distinguish between the validity of marriage, as discussed in the previous section, and the recognition of a plural marriage for a specific entitlement. While entirely foreign polygamous marriages are universally considered valid in the United Kingdom, not all of the ordinary legal rights and obligations that flow from marriage will be extended to them. Even if valid polygamous marriages themselves may not violate public policy, in certain circumstances, their recognition in providing an entitlement to certain rights might well do. Accordingly, an entirely valid polygamous marriage may be recognised for some things, and not for others.

#### 3.3.1 Domestic Rights for Polygamous Spouses

The notion of public policy and the consideration of harm each have some bearing on decisions regarding polygamous marriage in a range of domestic legal contexts. Although the domestic discourse on polygamy is often dominated by a disapproving tone in the United Kingdom, valid polygamous marriages are considered an appropriate basis for a reasonably wide range of legal rights and entitlements, even though not all the rights which might

ordinarily flow from marital status will be offered to polygamous couples. Regarding matrimonial relief, the courts and the Law Commission have referred expressly to the particularly disturbing hardship which is caused by closing the doors of matrimonial courts to the parties in a polygamous marriage, as well as the risk of associated social problems. Accordingly, a domestic legal entitlement to matrimonial relief is provided for the participants in an actually polygamous marriage.<sup>266</sup> As a result, in the United Kingdom, a polygamously married wife or husband may petition for separation, annulment or divorce in the English courts, as well as claim financial assistance following a marriage breakdown.

Multiple polygamous wives have also formally been acknowledged in connection with inheritance purposes and intestate succession as ‘surviving spouses’ in Britain.<sup>267</sup> Here, the courts have said it is meaningless to consider public policy objections to polygamy where wives who are married in accordance with the law of their domicile regard themselves, entirely fairly, as wives.<sup>268</sup> As a result, the categorisation of additional wives as spouses for succession purposes does not conflict with the state’s public policy desire not to encourage the formation of polygamous households.<sup>269</sup> Any of the surviving wives of a valid polygamous marriage may

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<sup>266</sup> S 47 Matrimonial Causes Act 1973. Dicey (n 243) Rule 82 Matrimonial Causes and Family Law, say, the Rule applies notwithstanding the fact that either party to the marriage is, or has during the subsistence of the marriage, been married to more than one person. Dicey refers to the restriction in *Hyde v Hyde* and the recognition of polygamous marriage for matrimonial relief, hardship, distress especially after the influx of Commonwealth immigrants in 50s and 60s, and the fact that English judges did their best to limit the severity of the ruling, generally by converting a polygamous marriage to a monogamous one where they could to offer matrimonial relief.

<sup>267</sup> *Official Solicitor to the Senior Courts v Yemoh and Others* [2011] 2 FLR 371 (*Yemoh*) where polygamous wives were considered ‘surviving spouses’ under s 46 Administration of Estates Act, 1925, extending the reasoning in *Coleman and Shang* [1961] AC 481 to the domestic setting. In practice, the court did restrict the application of the Act so that the wives should be considered one spouse and share the statutory legacy equally. *Re Sehota* (Deceased) [1978] 1 WLR 1506. Court considering whether a polygamous wife is a ‘wife of the deceased’ for s 1 Inheritance (Provision for Family and Dependents) Act 1975 and said, yes.

<sup>268</sup> Of *Yemoh* Ruth Gaffney-Rhys, ‘The Legal Response to Polygamous Marriages in England and Wales’ (n 167) 319, says “Given that a spouse can now petition for divorce, annulment or judicial separation, an apply for matrimonial relief on separation, and financial provision on death and is recognised for the purpose of obtaining a grant of letters of administration it would have been illogical to deny polygamous spouses rights under the Administration of Estates Act 1925 as their marriages were lawful in the place of celebration and according to the law of domicile.”

<sup>269</sup> *Yemoh* (n 267) settled the matter in the UK, with the Court saying explicitly that the public policy reasons which used to be used to justify not recognising valid foreign polygamy re: matrimonial relief “would not appear ... to be of meaningful relevance to the question of succession under the Administration of Estates Act 1925.” The Court did point out the situation would be different if the polygamous marriage had taken place in England or if anyone was domiciled here. English public policy would oppose recognising that sort of polygamous marriage. Gaffney (n 167) says *Yemoh* did not raise any major public policy issues: it doesn’t encourage polygamy,

succeed to a husband's property on his death intestate whether he married one wife or several, and whether he died domiciled in a country where the law permits polygamy or in the United Kingdom, because to do otherwise would be unduly unfair to the wives concerned.<sup>270</sup> The Law Commission has also highlighted the plight of women in polygamous marriage in the context of social security entitlements, because:

*...[to] deny social security benefits [for polygamous marriages] may involve hardship and injustice ....*<sup>271</sup>

As a result, notwithstanding the state's public policy concern to discourage polygamy, valid polygamous marriages do in some cases provide the basis for a domestic entitlement to social security benefits, where undue hardship might otherwise be caused to the parties involved.<sup>272</sup>

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particularly as the court shared the statutory legacy (the tax free part of the deceased's estate) between all of the wives, rather than creating 8 shares. For another example of the early legal recognition of polygamy *Amin Din v National Assistance Board* [1967] 2 QB 213 where the wife, after being abandoned, applied for national assistance. She was a second wife, although the first wife had previously died. Her application for national assistance was successful. The Board pursued the husband under s 43 National Assistance Act 1948 which entitled the state to recover the costs of assistance from anyone liable for maintenance. The argument was the husband was liable for the costs of assistance under s 42(a) which said: a man shall be liable to maintain his wife and children. The court agreed 'wife' in this act should include a polygamously married wife. The husband was ordered to pay maintenance.

270 Dicey (n 243) 852. See *Baindail v Baindail* [1946] p 122, 127-8 (CA); *Coleman v Shang* [1961] AC 481 (PC); *Yew v Att-Gen for British Columbia* [1924] 1 DLR 1166 (BCCA); *Re Bir's Estate*, 83 Cal App 2d 258, 188 P 2d 499 (1948). Compare with *Re Sehota* [1978] 1 WLR 1506. Polygamous spouses qualify: *Coleman v Shang* [1961] AC 481, [1961] 2 All ER 406, *Cheang Thye Phin v Tan Ah Loy* [1920] AC 369, *Chii Eng Choon v Neo Chan Neo* (Six Widows' Case) (1908) 12 Straits Settlements LR 120.

271 Law Commission (n 250).

272 For a summary of the position on social security see Fairburn (n 240) in particular part 3. Social Security Benefits at 7, quoting a written answer to a parliamentary question by the Secretary of State for Work and Pensions, Chris Grayling, to what extent polygamous families are recognised in the benefits system, which also confirms the government has decided no longer to recognise polygamous marriages-measures in the Welfare Reform Bill will recognise this policy change regarding social security benefits, and when the universal credit regime comes in to force (at the time of writing this is anticipated in 2021) polygamous marriages will no longer be recognised for social security purposes. This may have the unintended consequence of meaning polygamous families have a greater entitlement; rather than applying as a collective they will apply as individual claimants and their entitlement may grow as a result. Grayling also confirms in the same answer that the government does not collect data on the number of polygamous households, or the cost of benefits for them. This is also confirmed by Department for Work and Pensions Minister, James Plaskitt, in February 2008, who said "... we do not collect data on the number of people in a valid polygamous marriage claiming a social security benefit. Information could be provided only at a disproportionate cost." See also Esther McVey, Minister of State for Employment, "[T]he Government has decided that universal credit, which replaces means-tested benefits and tax credits for working-age people, will not recognise polygamous marriages. Instead, the husband and wife who are party to the earliest marriage that still subsists can make a joint claim for universal credit in the same way as any other couple. Any other adults living in the household would each have to claim

Contributory benefits (i.e. those which require national insurance contributions in order to qualify, such as a state pension, bereavement benefit or employment allowance) are not available in respect of all spouses, however.<sup>273</sup> As mentioned previously, the law also treats bigamy and polygamy differently, so that individuals in foreign polygamous marriages are excluded from prosecution under criminal provisions dealing with plural marriage in the United Kingdom.

It is accepted that the recognition of entirely foreign polygamous marriage in the domestic legal context results, at least in part, from the balancing of domestic and foreign interests, in keeping with private international law aims and principles. The domestic recognition of polygamy is not simply to affirm international legal doctrine, however. Rather, as the comments of the courts and the Law Commission show, the hardship that might otherwise result from the non-recognition of polygamous marriages also dictates the British legal approach, so that there has been a trend of increasing legal acceptance since *Hyde*. While this recognition is not universal—polygamy is still recognised domestically for some purposes and not for others—neither is the objection to polygamy in the domestic legal sphere absolute. Despite concerns about polygamy and harm, a comprehensively hostile approach is not taken and a balancing act is carried out. Importantly, very often this is to avoid what might be viewed as a greater harm being caused by not recognising a valid plural marriage. Neither does the recognition of entirely foreign polygamy to avoid causing harm offend more general public policy aims, because it does not encourage British citizens in any way to engage in polygamy and does not interfere with the state's objection to the formation of domestic polygamous households. In no way does the recognition of entirely foreign, valid polygamous marriages alter the clear restriction on entering into a plural marriage in the United Kingdom, and any person domiciled here continues to be restricted from contracting a valid polygamous marriage elsewhere. As a result, valid polygamous marriages are capable of acting as the sole basis on which rights are granted with the advantage of allowing vulnerable individuals who require

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as a single person on the basis of their own circumstances. This process already happens where a polygamous marriage is not recognised in UK law", HC Deb 16 January 2014 c640W.

273 Any income-related benefits (for example, income or housing benefit) may be paid at a lower rate, or restricted to families living in the same household, so that the formation of polygamous households is not promoted.



and deserve the protection of the law to benefit, while still ensuring wider public policy considerations are not ignored.

### **3.3.2 Immigration Rights for Polygamous Spouses**

#### **3.3.2.1 The Early Approach in Immigration**

With the end of World War II, the United Kingdom experienced a sharp increase in migrants from former colonial territories. In particular, significant numbers of Muslims came to England from Commonwealth countries, including large numbers from Pakistan, Bangladesh and India. These migrants came often with the purpose of providing labour for post-war rebuilding. Many who came in this initial wave of migration had relatively free access to work in the United Kingdom as a result of the ‘Citizen of the United Kingdom and Commonwealth’ immigration scheme.<sup>274</sup> Because they enjoyed reasonably free movement under the scheme, often these early migrants did not intend to stay permanently in the United Kingdom. Their tendency was to ‘commute’ between locations, staying in Britain for long periods of work before returning home, dividing their time between their work obligations and their personal obligations in their home country. This meant that, initially, their families did not travel with them.

The different lifestyles of those who came in this post-war wave of migration prompted much public comment, perhaps also because they were coming in much larger numbers than ever before, and the new migrants gained much attention. Developing concerns over the protection of domestic economic interests and a growing, xenophobic fear of the impact that migrants might have on English society are perhaps indicated nowhere more clearly than in the speech delivered by Enoch Powell in April 1969, in which he criticised broad Commonwealth

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<sup>274</sup> CUKC. For additional information on domestic immigration law regarding migration and international family migration, see Gina Clayton, *Textbook on Immigration and Asylum Law* (4th edn OUP, 2010), Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell London, 20014), John Murphy, *International Dimensions in Family Law* (MUP, Manchester 2005), Helena Wray, *Regulating Marriage Migration into the UK* (n 236).

migration and resorted to a racist foundation to call for its halt.<sup>275</sup> Although Powell's speech was widely condemned for being extreme, it was undoubtedly symptomatic of a more general fear of migration and difference. In the period immediately after, and throughout the 1970s and 1980s, it was the same fear that drove the British government openly to pursue policies of cultural assimilation in an attempt to assuage concerns about migrants, multiculturalism and social cohesion. This began with changes to the CUKC scheme, which had allowed so many migrants to come to the United Kingdom, and was followed later by the introduction of more targeted immigration restrictions directly affecting plural families.

Under the government's new policies, initial changes meant those who came here for work were unable to move so freely between borders as before and it became necessary for them to settle more permanently in Britain to continue working without being separated from their families. In order for migrant workers to combine their working lives with their family lives, migrant women and children very quickly became the majority of applicants for entry, sponsored by their husbands and fathers, in line with family reunification policies of the time. Numerous among these new categories of migrants were the many Muslim families who came from the Indian sub-continent. They became increasingly visible with the construction of mosques, the establishment of new religious centres, the availability of *halal* food and the introduction of religious education—all new additions to the British cultural landscape.<sup>276</sup> Valid, foreign polygamous marriages were not a barrier to immigration at this time, and as a result, it was also among this wave of Muslim migrant families that polygamy first became more commonly practised in Britain.

The visibly changing nature of British society prompted further fears about the impact new entrants might have on social order, and at a time of high racial tension, rising anxiety over the influx of migrants with different religious and cultural practices resulted in significant additional immigration restrictions. At this time, the United Kingdom government began openly to express its preference for adopting policies of limiting immigration as well as

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<sup>275</sup> Enoch Powell delivered the speech on 20 April 1969 at a Conservative Association Meeting. The full text of the speech has been reproduced by *The Telegraph* here: <<http://www.telegraph.co.uk/comment/3643823/Enoch-Powells-Rivers-of-Blood-speech.html>> accessed 22 April 2017.

<sup>276</sup> Ahsan (n 96) 21.

encouraging cultural assimilation, and took action specifically to limit family reunification for that purpose.<sup>277</sup> The state's goal at this time appeared to be encouraging conformity with what was considered a 'traditional' British way of life and to that end immigration controls were tightened with the enactment of the 1970 Immigration Act.<sup>278</sup> Restrictive rules for the entry of spouses were introduced, signalling what was to be the beginning of an on-going decline in support for large-scale family migration in the United Kingdom.

While none of the immigration restrictions at this time introduced an express prohibition on the entry of polygamous wives, the fact of increased restrictions together with cases like *Zabra and Another v Visa Officer, Islamabad* in the late 1970s provide evidence of the state's general antipathy towards the idea of certain categories of migrant. In general, those who were less likely to conform or assimilate were made less welcome to settle in the United Kingdom.<sup>279</sup> In *Zabra*, the applicant made a claim to the visa officer at the British Embassy in Pakistan to join her husband and settle in the United Kingdom as his second wife, together with their son. The couple had been married in October 1974 in Pakistan. The entry clearance officer applied s 11(d) of the Matrimonial Causes Act and determined that her husband had been domiciled in England at the time of their marriage and, although the polygamous union was valid under Pakistani law, according to English law her husband had no capacity to contract an actually polygamous marriage.<sup>280</sup> At the time, the Immigration Rules also stated that a 'woman who has been living in permanent association with a man ... may be admitted as if she were his wife, due account being taken of any local custom or tradition tending to establish the permanence of the association.' This more favourable provision was dismissed out of hand, the Immigration Appeals Tribunal ruling that it was intended only to deal with monogamous

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277 Sona (n 247) 3 refers to the fact that the changes in the 1970s were designed to encourage conformity with British standards of behaviour, and relies on statements in Law Commission reports on matrimonial disputes in courts to support this view on the basis for change. Sona says the changes were to force migrants into British patterns of behaviour.

278 Immigration Act 1971 and the introduction of the Immigration Rules.

279 *Zabra and Another v Visa Officer, Islamabad* [1979-80] Imm AR 48, goes some way to raise questions about the real purpose of immigration restrictions being to restrict the 'other', which is discussed in Wray (n 236) 83 "The reference to an oriental pasha places the polygamous marriage in the realm of the exotic, obviating the need to take the claim for entry seriously. The strong impression is that the Tribunal did not wish this application to succeed and the unfavourable decision on domicile was part of that."

280 At no point did anyone considering the case apply s 14(1) of the Matrimonial Causes Act 1973, a saving provision which allowed for consideration of the legal validity of a marriage in the 'home' jurisdiction.

marriages and remarking that allowing a husband to come with his 'harem' would be absurd.<sup>281</sup> The marriage in *Zabira* was declared void and, accordingly, the entry clearance officer's decision to refuse entry to the second wife in a polygamous family was upheld on appeal.

Even though the legislative trend was for tighter restriction, it is worth noting that the available law was not always interpreted by the courts to the disadvantage of polygamous families. The eligibility of a spouse now depended on whether or not their partner was domiciled in the United Kingdom at the time of the marriage and determining domicile was often not straightforward. In the cases following *Zabira* some courts showed willingness to use this uncertainty for the benefit of those in polygamous marriages, with the effect that polygamous spouses were able to join their partners.<sup>282</sup> Judicial empathy for the suffering of affected families meant that, whatever the formal restrictions on polygamously married couples, they were not always interpreted to the family's disadvantage. As a result, until the introduction of legislation expressly restricting polygamy in immigration, refusals for wives tended to be limited to those cases where a husband had unequivocally acquired English domicile prior to the marriage.

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281 Prakash Shah (n 11) 9, expresses the view that the language used by the Court and its method of reasoning to avoid making use of s 14 Matrimonial Causes Act illustrate an intention to ensure an 'assimilationist' approach to polygamous marriage. The measures introduced, while not necessarily directed at Muslims, were closely associated with controlling the immigration of Muslims, reflecting a rise in political agitation against Muslims in Britain at the time. In this regard, in his legal pluralist critique of anti-polygamy legislation, Shah describes the new laws as part of a redrawing of 'culturally articulated battle lines'.

282 Shah (n 11) referring to *Rokeya and Rabby Begum v Entry Clearance Officer, Dacca* [1983] Imm AR 163 where the Court underlined the burden of proof on those alleging that the domicile of origin had changed was a heavy one, particularly where a family is split between England and another jurisdiction. While the Court did not ignore the basic requirement for the domicile test, they did find a way to hold that the marriage was valid by finding enough evidence to conclude the domicile of origin had not changed. In this case a husband married his first wife in Bangladesh in 1969, was domiciled in the United Kingdom in 1972 and married his second wife in 1975. The immigration officer decided that because the husband had been domiciled in England at time of his second marriage, the marriage was void under the Matrimonial Causes Act and therefore, the additional wife was not entitled to claim the right of abode. However, the Immigration Appeals Tribunal 'sympathetically' found a way around the matter of domicile to hold that the marriage was valid, by saying that the change in the husband's place of domicile had not been established convincingly. See also *Entry Clearance Office, Dhaka v Ranu Begum and Others* [1986] Imm AR 461 where a re-acquiring of Pakistani domicile was found so that a second marriage was valid. Again, the Court appeared to be relieved to have narrowly escaped the burden of ratifying the idea that an English domiciliary might have a valid polygamous marriage (albeit only for marriages celebrated prior to the August 1972 deadline.) Shah says the judgments seems to favour upholding a marriage if it is possible to do so.

### 3.3.2.2 The Current Approach in Immigration

Racial tensions associated with migration continued and in the 1980s the government's response to immigration hardened further.<sup>283</sup> The enactment of the new Immigration Act and Immigration Rules 1988 targeted polygamous families directly, introducing the first express ban on permanent settlement in the United Kingdom for polygamous wives.<sup>284</sup> While the introduction of the new Immigration Act and Rules did not affect the validity or otherwise of a polygamous marriage (which was still determined according to conflicts rules and questions of domicile) it severely limited the immigration rights of actually polygamous wives by expressly permitting a husband to sponsor only one of his wives for a spousal visa. The unequivocal ban on entry for additional wives made reference to questions of domicile, or the validity of a marriage for immigration entitlement, irrelevant. In essence, from 1988, where one wife in a polygamous relationship had already acquired the right to live in the United Kingdom through her husband, an additional wife could no longer exercise any right she might otherwise have had to settle here with her husband and family.<sup>285</sup>

Following the introduction of the new restrictions, immigration cases increasingly featured polygamous families seeking to find a way around them. However, this time, English judges followed the new statutory regime rigidly and harm suffered by polygamous wives was entirely

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<sup>283</sup> Evidence of tension around this time is reflected in events, like the Muslim Charter of Demands during the 1987 election and in vociferous mainstream objections to it. It is also around this time that the Rushdie affair explodes in Britain, in September 1988, raising further doubts for some about possibility and progress of multiculturalism.

<sup>284</sup> Immigration Act 1988 and paragraphs 278-280 of the Immigration Rules (HC 395 of 1993-4 as amended) s 2 of the Immigration Act 1988 is the primary section restricting polygamous wives from settling in the United Kingdom. See also Immigration Rule 278. The Rules and the Act are supplemented for Home Office staff with the Immigration Directorate Instructions, Chapter 8, Annex C, Spouses, (July 2012) <https://www.gov.uk/government/publications/chapter-8-section-1spouses>, which states, where a man with polygamous wives wishes to settle in the United Kingdom, only one wife may come, and she will only be eligible for settlement where no other wife has already been admitted to the United Kingdom. In this regard, it is the order that wives come to the United Kingdom which is relevant, not the order in which they were married. See also Home Office, Polygamous and Potentially Polygamous Marriages, Immigration Directorates' Instructions, Chapter 8 Section FM 1.4 Partners (July 2012).

<sup>285</sup> Although, as explained earlier, this had no prohibitive effect on a polygamous wife seeking permission to enter and remain in the United Kingdom using a basis other than her status as a spouse, for example as student or a general visitor, provided such alternative route was available. Sona (n 247) 15 describes this legislation as marking a "...new departure in the attempt within British law to control polygamy through immigration restrictions." Sona argues that immigration is used to control polygamy, and polygamy is stigmatised to reduce immigrants. Additional wives can visit temporarily according to s 2(7) Immigration Act.

excluded from consideration. This fact is well illustrated by a case involving a second wife in Bangladesh who had effectively been abandoned by her husband (living in England) and who no longer enjoyed the support of her family in Bangladesh either. The applicant was virtually destitute and sought to challenge the legality of the Immigration Rules prohibiting her entry on the basis they were *ultra vires*.<sup>286</sup> In response, her husband relied on the legal exclusion of additional wives. At the High Court and later the Court of Appeal, the restriction on her entry was upheld, although some sympathy was expressed for her circumstances.

In some cases, the question of domicile and the legislative impediments to immigration were considered together, although with no positive effect on the outcome for applicants either. In *R v Secretary of State for the Home Department ex parte Zeenat Bibi* the second wife had arrived as visitor to the United Kingdom in 1991.<sup>287</sup> Her husband had been in here since 1967, was registered as a British citizen in 1974 and married the appellant in 1989. While the case was being heard the couple had two children, both born in the United Kingdom. The wife was declared an illegal entrant and her application to remain in the United Kingdom was refused. The Secretary of State had declared the marriage polygamous and invalid. The lower court judge said that the marriage was invalid because of the husband's domicile at the time the couple were married. The higher court expressed the view the marriage was valid but the Immigration Rules prevented an application as a spouse in the circumstances. Neither court said the wife's removal was unreasonable, even though the two children were British citizens and they had the right of abode themselves. Commentators have described this example of the implementation of the 1988 Act and Rules as a:

*... particularly disappointing case, with the judges blindly following the statutory rules without regard to the human factors involved...*<sup>288</sup>

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<sup>286</sup> *R v Immigration Appeal Tribunal, ex parte Hasna Begum* [1995] Imm AR 249. The applicant argued that the Immigration Rules cannot exercise a power which is wider than the provisions of the Act to which it relates, among other things, in an effort to overturn the entry clearance officer's decision and obtain entry to the United Kingdom. The Court viewed the suggestion that the Rules were *ultra vires* as 'misconceived' and for that, and other reasons, dismissed the application.

<sup>287</sup> *R v Secretary of State for the Home Department, ex parte Zeenat Bibi* [1994] Imm Ar 326 QBD, *R v Secretary of State for the Home Department Ex p. Zeenat Bibi* [1994] Imm. A.R. 550 (CA).

<sup>288</sup> Shah (n 11) 394.

Similarly, in *R v Secretary of State for the Home Department, ex parte Laily Begum* a widow from Bangladesh asked the Court to reconsider her removal from the United Kingdom.<sup>289</sup> She was a second wife and had four children to her husband before he died. Her children were based in the United Kingdom and some were also said to suffer from severe emotional problems. Despite this, the Court again considered it acceptable for the wife to be removed as she had no spousal entitlement to the right of abode. As this case and others like it illustrate, the result of the hardened immigration restrictions from 1988 onwards was to offer no flexibility whatsoever for the Courts to do anything but force migrants—and women in particular—to be without their families and to make them vulnerable to multifaceted hardship as a result.<sup>290</sup>

The blanket refusal to recognise polygamous marriages is notable for its impact, but also for the stark contrast between the treatment of polygamy in immigration matters, and the approach to it in the domestic sphere, where a more nuanced balancing of relative harms is still carried out. Here, there is some flexibility in the state's treatment of polygamy notwithstanding the public policy concern not to encourage plural families. Where that much more flexible domestic attitude towards foreign polygamy is also considered alongside the presumption from a conflicts of law perspective that valid foreign polygamous marriages ought to be recognised, the absolute prohibition of polygamy in immigration begins to seem curious. It begs the question, what precisely is the reason for the state's objection to polygamy in this context; an objection to polygamy based on concern about harm to women and society, or something else?

The comments of those involved in legal reform at the time of increased immigration restrictions provide some assistance in answering this question. The speech referred to earlier by Enoch Powell heralded a time of increased occupation by both the state and citizens with

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<sup>289</sup> *R v Secretary of State for the Home Department, ex parte Laily Begum* [1996] Imm AR 582.

<sup>290</sup> Cases involving polygamy continue to come before the Immigration and Asylum Tribunal in the United Kingdom, including a recent case where evidence of a civil divorce did not count as evidence of dissolution of an Islamic marriage and the Muslim marriage was considered valid. In this case, the maintenance of the polygamous marriage meant the sponsor's wife was eligible to join him in the United Kingdom (*Entry Clearance Officer, Amman v Da and Others*, Upper Tribunal (Immigration and Asylum Chamber) Appeal No Oa/12459/2014 (Unreported) (4 May 2016).

migration and difference. While the government attempted to attribute the on-going retrenchment of immigration rights in that period to the desire to promote harmonious community relations, rather than seeing restrictions as community-minded, the evolution of immigration law at this time has been described rather simply as “fundamentally racist.”<sup>291</sup> The motivation for more restrictions in immigration seems in part to have been the reduction of in numbers of demonstrably different newcomers. As a condition for social harmony, the aim of the state at this time was for fewer black and Muslim migrants to be allowed in.

This view of the policy driving immigration at the time is supported by the recent publication of private papers discussing changes to immigration legislation. In papers released by the National Archives in 2016, Margaret Thatcher, then Prime Minister, expressed her strong preference in 1986 for a clamp down specifically on Asian men bringing second wives into the United Kingdom, claiming to do otherwise would be to discriminate in favour of the “coloured Commonwealth.”<sup>292</sup> Comments by Mrs Thatcher and in communication with her ministers illustrate the public pressure being felt by the government, which led to legislative limitations on polygamy along with other restrictive measures. The papers are also illustrative of the contrasting approach taken in respect of the “old Commonwealth” and the decision not to limit working holiday makers, most of whom were from those countries with largely Christian and white populations, such as Australia and New Zealand. In this regard, the papers provide valuable insight into the minds of those in government at the time of the introduction of a universal ban on polygamy in immigration, providing evidence in support of the suggestion the ban on additional wives was less to do with preventing harm to women or society, and much more about restricting difference, exerting cultural superiority and expressing a tangible

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291 Chris Platt ‘The Immigration Act 1988: A discussion of its effects and implications’, Centre for Research in Ethnic Relations, University of Warwick, (Policy Paper) (May 1991) 2. Writing in 1991, Platt says the government characterised the bill as being designed to promote ‘harmonious community relations’. His argument is the 1988 Act is racist in truth and, while he can’t have known what has recently been released by the archives regarding the policy makers at the time and their thoughts, they would indicate there is some merit in his concerns.

292 Ben Farmer “Margaret Thatcher demanded halt to Asian men bringing second wives to Britain, newly released files reveal” *The Daily Telegraph* (21 July 2016) <<http://www.telegraph.co.uk/news/2016/07/21/margaret-thatcher-demanded-halt-to-asian-men-bringing-second-wiv/>> accessed, 7 September 2016, National Archives references: 1986 CAB 129/220 and CAB 129/221.



desire under some public pressure to exclude the ‘other’.<sup>293</sup> Given the likelihood that prejudice and fear provided the fundamental basis for more severe restrictions in immigration law regarding polygamous families, it is perhaps unsurprising that the 1988 Act has been described as:

*... blatantly racist ... the primary purpose of which is to prevent the entry of black people, in a structured and deliberate manner.*<sup>294</sup>

### 3.4 Polygamous Refugee Families

#### 3.4.1 Refugees and Family Reunification

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293 Bhabha and Shutter, *Women’s Movement: Women Under Immigration, Nationality and Refugee Law* (Trentham Books Limited, 1994) 126 suggest that, under the guise of eliminating sex discrimination, the government used the 1988 Immigration Act to remove the ability for polygamous wives to come in with their husbands. Even though the numbers of polygamous households were insignificant at the time (according to the authors) the possibility of polygamous households in the UK, they say, aroused racist and anti Muslim feeling which were the real reasons for the changes. “The unfortunate truth that must be accepted following the passage of an Act that is so blatantly racist and the nature and tone of the parliamentary debates relating to that passage is that it is the far right ... operating within the Conservative Party, have ... constructed its arguments in favour of an immigration control system, the primary purpose of which is to prevent the entry of black people, in a structured and deliberate manner.” Claire A Smearman in “Second Wives Club: Mapping the Impact of Polygamy in US Immigration Law” (2009) 27 Berkley J Int’l Law 382 discusses similar approaches to immigration policy in the United States to exclude “... the immoral Chinese, with their tradition of multiple wives and concubines ...” which would threaten the American way of life and family. Polygamously married immigrants were excluded from 1891 in the US, when Congress enacted first federal immigration statute: Law of March 3, 1891 (Immigration Act of 1891) ch 551, § 1, 26 Stat 1084. At 404 Smearman refers to the fact that in immigration law, a valid foreign marriage will not be valid for immigration purposes if it “violates the public policy of the United States.” In Canada, the Immigration and Refugee Protection Regulations, SOR/2002-227 (Can.) prevents migration by polygamous families. Note, the United Kingdom operates a relatively generous family reunion policy in respect of dependent children of spouses in valid, polygamous marriages, who are eligible for family reunification (*Abadul Islam and Monira Begum v Entry Clearance Office*, 2 July 2014 Upper Tribunal (Immigration and Asylum Chamber, Appeal Number: OA/22240/2012 and OA/22247/2012), is the most recent immigration appeal case confirming that valid foreign polygamous marriage will be recognised where a child seeks to enter and remain in the United Kingdom.

294 Chris Platt (n 291) quotes T Renton, Lords Committee Stage 21 March 1988 col 49 “If people want to have the advantage of coming to live in our civilised society, I believe they should accept our standards.” Platt takes from this the real aim of clause 2 is to prevent families from the Indian sub-continent from coming and he says this is deliberate policy, not just an unfortunate side effect. For a reconstructed historical account of refugees and claims to asylum in the United Kingdom see Prakash Shah: *Refugees, Race, and the Legal Concept of Asylum in Britain* (Cavendish, 2000).

The tradition of offering asylum to those who do not enjoy safety in their community of origin has a long history. In the modern setting, the provision of refuge is inextricably linked with international human rights standards, which reflect states' formal recognition of the wider good in protecting those seeking asylum. The United Kingdom is a signatory to the Refugee Convention, the document primarily responsible for setting out states' obligations to refugees, and acknowledging the right to asylum by placing formal and binding obligations on states who have signed up to it.<sup>295</sup> Accordingly, Britain has an obligation in international law to provide asylum to anyone meeting the definition of a refugee. According to the Refugee Convention, a 'refugee' is someone unwilling or unable to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.<sup>296</sup> The Refugee Convention offers the possibility of safety for anyone fleeing persecution and in need of international protection because they no longer enjoy the protection of the state in their country of origin. It provides safeguards to anyone granted refugee status, including the right not to be returned (or the right of *non-refoulement*) so that no state may expel anyone who meets the refugee definition. Minimum standards of treatment for refugees are also outlined in the Refugee Convention, which require that refugees must be treated with dignity and respect. The fundamental right to seek asylum from persecution is also grounded in other manifestations of human rights guarantees, appearing in Article 14 of the Universal Declaration of Human Rights, for example.<sup>297</sup> It is also strengthened by reference to other fundamental human rights principles,

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<sup>295</sup> Refugee Convention (n 1), which was initially backward looking, aimed at offering protection for European refugees following World War Two. The 1967 Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967, 606 UNTS 267) expanded the Convention, removing the temporal and geographic limitations, ensuring it was a forward looking instrument. Further guidance can be found on the meaning of the Refugee Convention in UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees UN Doc HCR/IP/4/Eng/REV 3 (2011). The UNHCR (the office of the United Nations High Commissioner for Refugees, the refugee agency at the United Nations) has responsibility for safeguarding refugees. In Europe, see also the EC Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection (known as the 'Qualification Directive' as it sets out the definitions of those who qualify for protection. UK law brings the Qualification Directive into domestic law via the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525) and modifications to the Immigration Rules (see Part 11). The Refugee Convention does not apply to all who satisfy the definition of a Refugee under Article 1, including anyone who has committed war crimes or crimes against humanity, serious non-political crimes, or anyone guilty of acts contrary to the purposes and principles of the United Nations.

<sup>296</sup> Refugee Convention (n 1) Article 1A .

<sup>297</sup> UDHR (139) Article 14 "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

such as non-discrimination. Accordingly, the right to protection for refugees ought to be honoured without discrimination as to race, religion, age, disability, sex or any other prohibited ground.<sup>298</sup>

Family associations are vital in ensuring effective settlement and integration for anyone migrating to a new country, including and perhaps more particularly, for refugees. It is generally recognised the family is entitled to “ ... respect, protection, assistance and support.”<sup>299</sup> Central to this is the formal process of family reunion, the significance of which has described by representatives of the Home Office as:

*... a fundamental principle-not a privilege but a right-that it would not be proper to take away: [that is] that of a mother and her children to join the father who is already settled in this country.*<sup>300</sup>

While applications for refugee status are protected by international human rights guarantees, no express right to family reunification exists in either the Refugee Convention or in any other human rights instrument.<sup>301</sup> Although the Final Act of the UN Conference of Plenipotentiaries on the States of Refugees and Stateless Persons unanimously endorsed the principle of family unity as an essential refugee right, requiring states to take positive steps towards the preservation of family unity and the UNHCR has promoted the idea of family unity since the Refugee Convention was introduced, no clear ‘right’ to family reunion exists in international law.<sup>302</sup>

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298 UDHR (139) Article 2.

299 European Council on Refugees and Exiles ‘Position on Refugee Family Reunification’ (Report) (July 2000), 5. The recognition of families is discussed by Helene Lambert in ‘Family unity in migration law: the evolution of a more unified approach in Europe’ in Chetail and Bauloz (eds) *Research Handbook on International Law and Migration* (Edward Elgar, 2014) 194, where she quotes Kate Kastram, ‘Family Unity: The New Geography of Family Life’ (Migration Policy Institute, 1 May 2003).

300 HC Deb 24 July 1968, vol 769 col 852.

301 One possible exception to that rule may exist in the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Articles 9 and 10 work together to ensure that children are not generally separated from their parents. Article 10 deals specifically with applications for family reunion by children, requiring that states deal with applications in a positive, humane and expeditious manner. Whether that equates to a right to family reunification is moot, particularly as some states will still refuse to allow the children of additional polygamous spouses residency rights.

302 Refugee Convention (n 1), Final Act s IV Recommendation B.

Accordingly, once settled, the process of reuniting a refugee sponsor with family members is largely governed by domestic immigration law, meaning that requirements for family reunion differ in individual states.<sup>303</sup> The United Kingdom does offer the possibility of family reunion, recognising the fragmentation that occurs for all migrants, but in particular for refugee families who may be forced to leave their country of origin quickly. This, and the importance of family to the process of refugee re-settlement, are reflected in British domestic law and policy, which allows refugees and their immediate families to reunite and settle together. To that end, family reunion provisions permit anyone granted refugee status to apply to have their immediate family in the form of spouses and children join them.<sup>304</sup> In addition, the particular challenges faced by refugee families are acknowledged, and refugees are treated more favourably than general migrants who wish to reunite their families, with no prerequisite obligation for financial maintenance or accommodation, and no cost is incurred by any refugee wanting to make an application.<sup>305</sup> The special hardship faced by polygamous refugee families is not, however, reflected in family reunion laws. Regardless of the validity of their marriage, additional wives in polygamous families are without exception excluded from being reunited with their families according to immigration law. Immigration Rules and policy guidance for caseworkers assessing refugee family reunification makes it clear that only one wife in a

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303 The substantive 'right' to family unity will be discussed in detail in the following chapter on human rights. For now, it is suffice to say that no formal, express right to family reunion exists and states have a large amount of autonomy about how they manage the family reunification process.

304 Provided with regard to spouses that any solemnisation of the relationship took place before the refugee sponsor fled the country of origin; Immigration Rules Part 11 Immigration Rules, 352A – spouses (352D children) – family reunion Rules. See also policy in the Asylum Instruction provided by the UK Border Agency to provide guidance for Case Owners working in assessing asylum claims, see: Home Office 'Family Reunion: for refugees and those with humanitarian protection' (Version 2.0) (29 July 2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257465/familyreunion.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257465/familyreunion.pdf)> (accessed 15 December, 2015) and Home Office 'Family Reunification of Third Country Nationals in the European Union' (March 2017) <[https://ec.europa.eu/homeaffairs/sites/homeaffairs/files/28a\\_uk\\_family\\_reunification\\_final\\_en.pdf](https://ec.europa.eu/homeaffairs/sites/homeaffairs/files/28a_uk_family_reunification_final_en.pdf)> accessed 22 April 2017. As the guidance specifies, also included are unmarried or same sex partners (evidence is needed of two or more years together before fleeing) and children under 18, step children where the biological parent is dead, or anyone else conceived by the sponsor before fleeing. Other extended family or non pre-existing family can apply to come the United Kingdom under other provisions of the Immigration Rules or under Article 8 ECHR (the Right to a Family Life) but they do not qualify for family reunion and applications are more complex and difficult.

305 Home Office Guidance (n 304).

polygamous family may take advantage of reunion provisions.<sup>306</sup> No evaluation of harm is carried out in assessing reunification entitlements, no exception is made for the refugee status of the sponsor and no consideration is given to the plight of the family concerned.

### 3.4.2 The Impact on Polygamous Wives

Many women placed in refugee situations show remarkable strength and resourcefulness in coping with their daily realities as they take care of themselves and their families. Women, alone or not, have an incredible capacity to make the best of their situation where possible and very often it is women in refugee communities who drive improvements and effect change for the benefit of themselves and their families.<sup>307</sup> Whatever the strength and resilience of displaced women, however, as already outlined, it remains the case that the experiences of refugee women are also disproportionately challenging. Their journey has been described as one of grinding hardship, filled with misery, anxiety and isolation.<sup>308</sup> For these women, it is a journey where:

*They have run out of money, face daily threats to their safety, and are being treated as outcasts for no other crime than losing their men ... It's shameful. They are being humiliated for losing everything.*<sup>309</sup>

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306 Immigration Rules 278-280 and Home Office: Family Reunion: for refugees (n 304), 19 polygamous marriages. The document also provides guidance for officers where exceptional circumstances or compassionate factors exist and granting of leave is appropriate outside of the Immigration Rules. Additional polygamous wives are not mentioned in this part of the guidance, where unjustifiably harsh consequences may give rise to a right to enter and remain.

307 Amnesty International (n 18), Townsend (n 19), International Rescue Committee and Human Rights Watch (n 20), UNHCR Executive Committee, Beswick, Johnsson and UNSC Res 1325 (British Red Cross) (n 21), each of which details the specific hardship suffered by women in refugee settings.

308 Maya El Helou 'Refugee Camps in Lebanon: Syrian Women Bodies as a Site of Structural Violence' (Report) (18 December 2014) <<http://english.legal-agenda.com/article.php?id=673&lang=en>> accessed 10 March 2015.

309 Antonio Guterres, UNHCR Chief in Harriet Sherwood, 'Syria's female refugees facing poverty, harassment and isolation' Guardian (London, 8 July 2014) <http://www.theguardian.com/world/2014/jul/08/women-head-quarter-syrian-refugee-families> accessed 12 March 2015. The Office of the United Nations High Commissioner for Refugees.

In the British context, the absolute exclusion by immigration laws of women in polygamous marriages sits in stark contrast with the approach to polygamy in the domestic legal sphere. In that regard, when one considers the impact on refugee women, the disjuncture in the domestic treatment of polygamy and its treatment in immigration becomes deserving of attention. At first glance, the state's complete ban on polygamy appears entirely reasonable. How can it be improper for the government of the United Kingdom to exclude cultural or religious practices which it deems breach the minimum standard of the state's own core values? That position is undermined, however, by the timing and purpose of the introduction of legislative restrictions on polygamy. The relevance of fear, and most particularly a fear of those who are demonstrably different, is reflected in both the public and private statements of politicians around the time of increasing immigration control. In the United Kingdom, the absolute prohibition on polygamy in immigration has much to do with excluding difference, perhaps explaining why the state doesn't carry out any balancing of relative harms in the immigration context. Given the doubts over the state's motives for the absolute prohibition on polygamy in immigration, this work suggests that the on-going basis for that policy, especially in the refugee context, must be explained and justified, to prove the state is not hiding behind the 'impenetrable cloak of harm' to exclude those who are simply different, to the great expense of women and their families.<sup>310</sup>

## Conclusion

This chapter has charted the practice of polygamy in the United Kingdom and its treatment under English law. While the state may prohibit and punish civil, bigamous marriages and largely ignore religious plural marriages entered into domestically, the United Kingdom has a long tradition of acknowledging plural marriages that are validly formed elsewhere. While the recognition of entirely foreign polygamous marriage undoubtedly arises in part because of international law obligations, it is also linked with concern for the greater harm that might be caused by *not* recognising polygamous marriages. The state's concern for harm is illustrated in

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310 Shah (n 11) expresses his concern about this possibility, arguing that polygamy restrictions in immigration reflect "... culture wars, while not achieving the aim of eliminating polygamy as ethnic minorities continue to navigate among various legal levels to circumvent official laws ... being waged potentially at the expense of women and against the best interests of their children."

case law and legal commentary on the legal response to polygamy, in which the importance of preventing unnecessary harm, most often to wives, is expressly referred to.

Despite the United Kingdom's own willingness to acknowledge polygamy for domestic purposes, as well as the comments of the state's own representatives regarding the importance of family reunion and its status as a 'right' not a privilege, the same readiness does not feature when it comes to polygamy in immigration. Where plural marriage and the laws governing settlement in the United Kingdom collide, non-monogamous families are universally and without exception denied the opportunity to settle together in the United Kingdom as family units. This disjuncture in the treatment of polygamy in the domestic and immigration settings is arguably not only inconsistent, but also particularly disturbing when it is considered in the context of refugee families. The blanket ban on polygamy has the potential to cause hardship to those who are already likely to be suffering a great deal. Any hardship caused by the polygamy ban is also more likely to be suffered disproportionately by displaced women because additional wives who are forced to remain in unstable environments face an even great risk of a range of harms, some of which are specific to their gender.

Even where one allows for the public policy driving the prohibition of polygamy to take precedence, the disjuncture in the formal treatment of polygamy in the domestic and immigration spheres remains difficult to reconcile. The inconsistent treatment of polygamy, as well as the disproportionate impact of its universal prohibition on women, provides a prompt for the reconsideration of the legal response to polygamy in the United Kingdom. That reconsideration begins in the following chapter, with an examination of the assistance that might be offered by human rights to displaced wives to assist in challenging their universal exclusion.

## Chapter 4

### The Problem: The Promise and The Failure of Human Rights

#### 4.1 The Scope of this Chapter

This chapter considers the treatment of polygamy by human rights. International human rights guarantees make the actions of sovereign states reviewable according to supra-national standards. This chapter interrogates the promise of rights, their efficacy in practice and whether they provide effective, universal protection. While rights are commonly presumed to be “... impeccable with everything else being adjusted to maintain that assumption”, here, the paradox of polygamy is used to reveal discomfort with that idea because rights fail to treat displaced polygamous wives—whether unintended or not—as anything other than the quintessential and relentlessly undeserving ‘other’.<sup>311</sup>

This chapter begins by outlining the promise of modern human rights standards. The first part outlines the modern system of international, regional and domestic human rights protection. The efficacy of that system is then questioned, as the rights guarantees that are offered to two distinctly relevant groups, refugees and women, are assessed for their effect. The notion of ‘women’s rights’ and whether or not there is any tangible and enforceable right to family unity that might be claimed by refugee families are discussed, and more direct rights are tested such as the right to equality, the right to marry and the right to a family life. This critical review of rights attempts to develop a deeper understanding of human rights responses to certain categories of people. Pluralist, postcolonial and feminist critiques are explored, as the idea of universal rights is examined more closely. Each of the critical threads is brought together to assess the relevance of human rights failures in practice.

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311 Mashood Baderin, *International Human Rights and Islamic Law* (OUP, 2003) 15, who refers to the common presumption that rights and the current interpretation of them are “... impeccable with everything else being adjusted to maintain that assumption, 4, quoting Watson, *JS Theory & Reality in the International Protection of Human Rights* (1999).



This analysis is intended to lay a foundation for the final substantive chapter in this work, which seeks to reshape the discussion on polygamy regulation, by applying a refreshed feminist approach to its treatment in law and human rights.

## **4.2 The Promise of Rights**

### **4.2.1 International Human Rights**

Until the early twentieth century, the pre-occupation of formal international legal rules had been with regulating the behaviour of states in relation to each other.<sup>312</sup> International law was regarded as something that governed conduct between nations, not individuals and states. Following the brutality of the Holocaust and in an effort to avoid anything like that happening again, international law began—on a wide-reaching scale and with state accession—to regulate states’ treatment of individuals. In the seventy years since then, a system of rights has evolved which scrutinises and regulates states according to international, regional and domestic human rights regimes. This modern coming together to maintain peace and security and to promote and encourage respect for human rights is embodied in the United Nations, whose founding charter witnesses an agreement by states to co-operate in achieving universal respect for human rights.<sup>313</sup> The commitment in the Charter of the United Nations to promote human rights led to the new inter-governmental organisation’s first codification of rights standards in the Universal Declaration, a non-binding statement on the scope and importance of rights.<sup>314</sup> Since the UDHR, international human rights standards have grown exponentially and have been implemented with a reasonable degree of consensus by states. An International Bill of Rights in the form of two covenants, the International Covenant on Civil and Political Rights

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312 Antonio Cassese, *International Law* (OUP, 2nd edition, 2005) provides a useful exposition on international law rules and practice.

313 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Article 1, 55 and 56. James Hathaway *The Rights of Refugees Under International Law* (CUP, 2014) 43, says the commitment is context specific; states are only required by the charter to honour human rights only where a failure to do so might risk stability and well-being among nations. Using this interpretation, the Charter does not commit states to an all-encompassing human rights obligation, rather, they are duty bound to respect rights only where non-compliance with rights would have a negative impact on security and inter-state relations.

314 UDHR (n 139).

(ICCPR)<sup>315</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESC),<sup>316</sup> were adopted by the United Nations General Assembly in 1966 and came into force ten years later. As a result, rights were no longer a question simply for domestic preference or practice and states became answerable to the international community for their behaviour in the domestic sphere.

This early promise of rights led to the implementation of many additional international human rights guarantees, each one aimed at providing specific types of protection. To date, the United Nations has drafted and continues to enforce more than eighty human rights treaties, securing its prominence as the primary source of codified, international human rights law. The rights of refugees, women, minorities, children, people with disabilities and protections against discrimination, religious persecution, torture, genocide, and slavery are provided in treaties and declarations adopted by states members at the United Nations. Most relevant to this work are the Refugee Convention and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which respectively shield non-citizens who no longer benefit from the protection of their own state, and target the needs of women.<sup>317</sup>

The developing network of human rights standards is monitored by the United Nations with seven of the most fundamental international human rights treaties overseen by committees.<sup>318</sup> Some have the power to hear specific complaints and others the power to review member states' behaviour with respect to their treaty obligations, making general comments and recommendations for improvements. Although this system of international human rights law

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315 ICCPR (n 139).

316 ICESCR (n 139).

317 Convention on the Elimination of all Forms of Discrimination Against Women (adopted 18 December 1979, entered into force entered into force 3 September 1981) 1249 UNTS 13.

318 Human Rights Committee (HRC) overseeing the ICCPR, Committee on Economic, Social and Cultural Rights (CESCR) overseeing the ICESCR; Committee on the Elimination of Racial Discrimination (CERD) overseeing the International Convention on the Elimination of All Forms of Racial Discrimination; the Committee Against Torture (CAT) overseeing the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment; Committee on the Elimination of Discrimination Against Women (CEDAW) overseeing the Convention on the Elimination of All Forms of Discrimination Against Women; and the Committee on the Rights of the Child (CRC) overseeing the Convention on the Rights of the Child. Only the HRC, CERD, CAT, CEDAW and the CRC may receive communications complaining about violations. In these cases, the committees will hear the complaint, and apply the treaty provisions, and may issue recommendations to remedy treaty violations.

does not always work directly to bring influence to bear, it is used as a ‘backstop’ when domestic rights or other legislation fails to uphold rights standards.<sup>319</sup> When national laws and protections fall short, international human rights provide a basis for applying pressure on governments to uphold their obligations.

#### 4.2.2 Regional Human Rights

In addition to the international regime of human rights guarantees, there are regional systems that also establish rights obligations. Most regions have a human rights treaty, including Europe, the Americas,<sup>320</sup> Africa,<sup>321</sup> and Arab states.<sup>322</sup> Although regional systems are based to an extent on the international example, each region has developed its own, unique system for outlining and enforcing human rights and no two regions operate in exactly the same way, or privilege the same things.<sup>323</sup> Notwithstanding the United Kingdom’s decision to depart from Europe following a referendum in June 2016, the arrangement with most relevance to this work at the time of writing continues to be the European regional system of human rights

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319 Kenneth Roth ‘What are Human Rights For?’ in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds) *International Human Rights Law* (OUP 2010), 8.

320 The Organisation of American States, whose Charter came into force in December 1951, around the same time as the European Union, and which brings together all 35 independent states of the American region, with a four-pronged approach to its essential purposes, one of which is the promotion of human rights. Human rights are governed according to the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS and overseen by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

321 The African Union is the regional inter-governmental body with responsibility for overseeing 53 member states across the region. It succeeded the Organisation of African Unity. Established in July 2002 it operates a framework for rights, overseen by the African Commission on Human and People’s Rights. The primary treaty is the African (Banjul) Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 whose guarantees are enforced by the African regional human rights court. The African system has specific rights guarantees for women (Maputo Protocol n 151) and children (the African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 2005) CAB/LEG/24.9/49 (1990).

322 The League of Arab States, first formed in 1945, is the body with oversight of rights in the region. The League has established the Permanent Human Rights Commission as the main political body charged with the protection of human rights within the Arab League system, although it does not have a reputation for being effective. The primary treaty body is the Arab Human Rights Committee, with oversight of the Arab Charter on Human Rights (adopted 22 May 2004, entered into force March 15, 2008) The League has been working towards establishing an Arab Court of Human Rights, but international human rights bodies have cautioned against the League adopting the model currently proposed, as it falls well short of international human rights standards.

323 In fact, the Asia Pacific region remains notably absent from this group, having not privileged any rights at all at a regional level so that no rights convention or system is in place in this region.

protection.<sup>324</sup> The European Convention for the Protection of Fundamental Rights and Freedoms entered into force in 1953 and is the most developed of all regional rights structures, having been in place for over sixty years.<sup>325</sup> In an important contrast with the international system of human rights overseen by committees at the UN, the implementation of European rights standards is supervised by the European Court of Human Rights (ECtHR, or European Court), whose judgments are binding.<sup>326</sup> The decision by the United Kingdom to leave the EU in no way equates to a decision also to leave the Council of Europe, or the European rights project, and the European Court continues for now to provide tangible judicial remedies for violations of human rights.

Although equality between men and women might be described as a founding value of the European Union, the European treaty system does not contain any special provision for women's rights, unlike the system overseen at the UN.<sup>327</sup> In addition, while the Charter of

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324 The 'Brexit' referendum as it was known took place on Thursday 23 June 2016, resulting in a 52% majority vote to leave the European Union. While the result is not legally binding, the United Kingdom invoked Article 50 of the Treaty on European Union (Lisbon Treaty) on 29 March 2017, formally activating the process of leaving the EU.

325 The Council of Europe has also adopted the European Social Charter (Revised) (adopted 3 May 1996, entered into 1 July 1999) ETS 163 to protect social and economic rights, establishing rights to housing, health, education and employment. Periodic monitoring of states' compliance with the social charters takes place and is overseen by the European Committee of Social Rights who hear collective complaints and periodic, national reports. The Committee of Social rights is made up of 15 independent, impartial members who are elected by the Council of Europe's Committee of Ministers for a period of six years, renewable once thereafter. There is some small overlap in the nature of protection provided according to each system and the ECtHR and the Committee of Social Rights attempt to enforce the Convention and the Charter in a complimentary way.

326 'ECtHR' or 'European Court'. The ECHR was formerly overseen according to a two-tier system comprised of the European Commission and the European Court, but this changed with the introduction of Protocol 11 in 1998. Article 46 requires the United Kingdom and other signatories to 'abide by the final judgement of the court in any case to which it is a party' so that the European Convention is binding on states and supervised by Committee of Ministers. The European Convention on Human Rights binds the 47 Member States of the Council of Europe. The development of 'margin of appreciation' at the ECtHR has allowed European states some autonomy and discretion in behaving relative to their regional human rights obligations and where there is tension between the ECtHR and the state regarding a particularly sensitive issue, a margin of appreciation may be relied on to limit any human rights burden. The European Court of Human Rights and its application to Member States of the Council of Europe may be distinguished from the Court of Justice of the European Union, or ECJ, and its application to the Member States of the European Union. The ECJ oversees the actions of EU institutions and clarifies European law for Member States of the European Union. While the ECtHR remains the body with primary responsibility for enforcing human rights, the ECJ affords the ECHR 'special significance' as a 'guiding principle' in its own decision-making.

327 Although there is no specific women's rights treaty in Europe, in 2009, the Treaty of Lisbon: Amending the Treaty on European Union and the Treaty Establishing the European Community (adopted 13 December 2007, entered into force 1 December 2009) 2007/C 306/1 (TEU) confirmed once again the importance of gender equality in the European Union and equality between men and women

Fundamental Rights of the EU includes a right to asylum, it too is limited in application.<sup>328</sup> The ECHR does not contain any express reference to asylum or refugees and the Refugee Convention unquestionably remains authoritative in assessing the individual human rights of refugees.<sup>329</sup> Despite these failings on the part of the European system, the ECHR still has the potential to offer individuals considerably more human rights protection throughout Europe than broad and less directly enforceable international human rights standards. Although the scope of rights at the European level is unquestionably more limited than in international and other regional systems, the ECtHR is self-professedly dynamic in its interpretation of rights under the ECHR, allowing the opportunity for the ambit of rights to develop as they need to, to adapt to modern circumstances.<sup>330</sup>

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features amongst the common values on which the European Union is founded (Article 2, TEU). The European Commission has also produced the Strategic plan for engagement for gender equality 2016-2019 <[http://ec.europa.eu/justice/gender-equality/document/files/strategic\\_engagement\\_en.pdf](http://ec.europa.eu/justice/gender-equality/document/files/strategic_engagement_en.pdf)> accessed 22 February 2017 and the Strategy for equality between women and men, set the framework for the Commission's work on gender equality (2010-2015) (September 2010) <[http://ec.europa.eu/justice/gender-equality/files/documents/strategy\\_equality\\_women\\_men\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/strategy_equality_women_men_en.pdf)> accessed 22 February 2017 links available at <<http://ec.europa.eu/justice/gender-equality/>> (accessed 4 April 2017). EU gender equality is also an integral part of the Charter of Fundamental Rights of the European Union, (26 October 2012) 2012/C 326/02 which prohibits discrimination on any grounds, including sex, (Article 21) and recognises the right to gender equality in all areas and the necessity of positive action for its promotion (Article 23). The Council of Europe has also enacted the Convention on Preventing and Combating Violence Against Women and Domestic Violence Istanbul Convention (adopted 11 May 2011, entered into force 1 August 2014) CETS No 201 ('Istanbul Convention').

328 Where national laws on asylum are regarded as implementing Union law, the Charter applies. The Charter of Fundamental Rights of the EU means, in practice, that any act undertaken by the EU and members states when implementing EU law must comply with the Charter, so that any provision of European or national law which breaches the Charter is invalid. For more information on the Charter and its relationship with asylum, see European Council on Refugees and Exiles 'The EU Charter of Fundamental Rights; An Indispensable Instrument in the Field of Asylum' (Report) (January 2017).

329 Charter of Fundamental Rights of the European Union (n 327) Article 18. The Charter is in reality a re-statement of existing rights, re-stating the right to asylum shall be guaranteed with due respect for the Refugee Convention. The Charter applies to EU institutions and laws, and was not signed or ratified by individual states.

330 The principle of evolutive or dynamic interpretation, discussed in P Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 Human Rights Law Journal 57, 62-66; F Ost The Original Canons of Interpretation of the European Court of Human Rights in M Delmas-Marty and C Chodkiewicz (eds) The European Convention for the Protection on Human Rights: International Protection Versus National Restrictions (Martinus Nijhoff, 1992) 238-318. The Court has confirmed this principle by saying " ... the Convention is a living instrument which ... must be interpreted in light of present day conditions ... [T]he Court cannot but be influenced by the developments and commonly accepted standards in ... the Member States of the Council of Europe ...", *Tyrer v the United Kingdom* (App no 5856/72) ECHR 25 April 1978.

Whether the ‘dynamic’ potential of European rights is always fully realised is another matter. In the refugee context, gaps in the European system have perhaps never been more significant than at the time of writing. While there are some EU and other agencies that have worked to provide humanitarian aid and emergency support to increasing numbers of people who are fleeing crisis, the scale of human displacement and global insecurity is unprecedented and the challenges are many. Although the Common European Asylum System suggests that states will have a joint approach in providing effective protection for refugees, in practice, state responses have been varied. Some states have been more welcoming than others, with those who have been the least well disposed towards refugees adopting repressive tactics to exclude, detain and deport people. European states who have responded in this way have not only displayed a shameful disregard for people who are fleeing failed states and civil wars, they have shown that states in Europe are able to do little to help those seeking refuge, with what amounts to complete impunity.<sup>331</sup> This treatment of refugees by European states begs the question: how it is that not all humans have tangible humanity in a region with such apparently strong human rights protection?<sup>332</sup> The inability of the regional human rights project—or what might more honestly be called a conscious denial of accountability by the European human rights system as well as by individual European states—to reconcile the abstract ‘human’ in treaties with the life of the human being in practice has been starkly evident. Refugees in Europe today continue to be denied meaningful access to human rights support so that, if they survive the journey to Europe, they often live half-lives, without many basic freedoms, detained or prevented from travelling, with little or no prospect of having any opportunity to seek and attain family unity.<sup>333</sup>

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331 Since 1999, the EU has been working on a Common European Asylum System (CEAS) and has introduced measures in an attempt to harmonise common minimum standards for migration. However, the European Commission has accepted the CEAS measures require updating to deal with the exponential rise in human movement in and around Europe and appears to be in the process of presenting proposals to improve the system in the future, and there is no doubt that European nations continue to take vastly different approaches to migration, as evidenced by the varying responses of Germany (with Chancellor Merkel expressing an ‘open door’ policy to welcome migrants) and Hungary (in resisting calls to welcome migrants and objecting to migrant quotas).

332 Costas Douzinas ‘Human Rights for Martians’ Critical Legal Thinking (3 May 2016) <<http://criticallegalthinking.com/2016/05/03/human-rights-for-martians/>> accessed 8 May 2017.

333 Even though the European system does not offer either refugees a right to asylum, states are required to adhere to human rights standards in their treatment of both migrants and refugees once they arrive. Early case law established that the ECHR prohibits the return of someone to a country where substantial grounds exist for believing they will face ill-treatment (*Soering v United Kingdom* (App No 1/1989/161/217) ECHR 7 July 1989, for example, and European standards have evolved so that rights guarantees are provided

### 4.2.3 Domestic Human Rights

In addition to the vast amount of international and regional human rights protections, states very often also adopt domestic human rights guarantees. Most countries have written constitutions or domestic bills of rights, or both, and the United Kingdom is no exception, with the Human Rights Act (HRA) providing important additional human rights protections in the domestic legal sphere.<sup>334</sup> The HRA was enacted to ‘bring rights home’ in the words of the government of the time because of weaker constitutional rights guarantees and difficulties in accessing the European system in practice.<sup>335</sup> Its most significant impact was to increase the protection offered to anyone with a human rights claim by giving rights a home-grown character and ensuring individuals were no longer forced to take cases to the European Court in Strasbourg. Also since the introduction of the HRA, laws in the United Kingdom must be interpreted in so far as it is possible in a way that is compatible with the rights set out in the Act, wrapping a rights framework more directly around all other domestic laws.<sup>336</sup> The Act also provides that any legislation in breach of its terms may be declared incompatible with rights standards, making a legislative rights breach more visible in the domestic sphere.<sup>337</sup> Although any inconsistency does not make the offending legislation void, a declaration of incompatibility acts as a signal from the courts to Parliament that the United Kingdom is breaching its binding, regional human rights obligations, thereby holding the government of the day directly to account. In addition, the obligations in the HRA apply to all public authorities and anyone carrying out a public function and although the Act is not applicable to the actions of private individuals or companies, public authorities can be subject to a duty

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regarding detention, *refoulement* and family unity, despite the absence of direct protection for refugees. Note, the Dublin III Regulation is also relevant in this context, setting out criteria and mechanisms for determining Member States’ responsibilities, known as the Dublin System, and applies to all 28 EU countries and four Schengen Associated States (Switzerland, Liechtenstein, Iceland and Norway). The Dublin system has been particularly relevant, and controversial, in the current crisis for its part in defining the difference between a state where an asylum-seeker may physically be present and a state that has responsibility for that person.

<sup>334</sup> Human Rights Act 1998.

<sup>335</sup> Home Office ‘Rights Brought Home: The Human Rights Bill’ (Cm 3782, 1997) paragraph 1.14 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/263526/rights.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf) accessed 22 February 2017).

<sup>336</sup> S 3 HRA.

<sup>337</sup> S 4 HRA.

to stop private actors from breaching human rights guarantees.<sup>338</sup> Where a breach is established the court may grant a remedy, including an award for compensation.<sup>339</sup> For these reasons, the HRA has undoubtedly brought enormous influence to bear in the domestic human rights context. Its place in the domestic legal sphere undoubtedly makes the pantheon of European human rights more accessible, promoting a culture of rights in the United Kingdom.

#### 4.2.4 The Future of Rights in the United Kingdom

In spite of their promise and influence on rights in the domestic legal discourse in the United Kingdom, the status of neither the ECHR nor the HRA is guaranteed. Since the process of departure from the EU has now formally been activated, it is inevitable that Britain will part ways with the European political project. While any departure does not compel the United Kingdom to sever ties with the European system of rights, a new rights regime is possible, perhaps even likely given that the British government has previously expressed its intention to propose a 'British Bill of Rights'.<sup>340</sup> Those in favour of domestic rights that continue to be informed by current European standards are hopeful that, should a new regime be introduced, any future changes will not weaken human rights protections. However, a nagging sense of uncertainty remains at the time of writing regarding the future breadth and depth of domestic human rights.

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338 S 6 HRA. This obligation doesn't apply if according to the law the public authority could not have acted differently

339 In addition to the HRA, in 2010 the introduction of the Equality Act boosted domestic anti-discrimination provisions by harmonising pre-existing law and introducing some small extensions of the law for example, in the context of gender reassignment.

340 David Cameron, then Prime Minister, made this claim in the lead up to the 2015 election campaign, following up on a 2010 Conservative manifesto commitment to repeal the HRA and restore parliamentary sovereignty, which he claimed had been diluted by the ECHR and the jurisprudence of the European Court. Calls for a British Bill of Rights, more obviously rooted in 'British values', have resurfaced more recently with the Brexit process. Perhaps more important in terms of predicting the British path of human rights, at the time she was Home Secretary, Theresa May (now Prime Minister) described the ECHR as being able to bind the hands of parliament, calling for Britain to withdraw from the European human rights project. While human rights campaigners have been critical of such suggestions, and there is much uncertainty at the time of writing about who may be at the helm of negotiations with Europe over Britain's exit of the EU with the snap election due to be held on 8 June, it is likely that calls for a 'British Bill of Rights' will not go away anytime soon.



The fear that rights protections will be diluted at the national level goes some way to elevating the importance of international human rights standards as an overarching system of rights guarantees. Whatever changes may be made to the framework and content of rights following the break with the EU, international laws remain a constant reminder of the United Kingdom's obligations. International standards have the potential to assist in preventing a decline in domestic rights protections, providing an anchor for any future, domestic rights commitments. With that in mind, this chapter turns now to those individual international rights claims displaced polygamous wives might look to for assistance, to investigate their substance, as well as their efficacy in practice.

### 4.3 The Efficacy of Rights

This part asks simply, do human rights live up to their promise? Although the modern system of human rights arguably goes a long way to preventing persecution, it is far from perfect. First, in terms of their substance, it has been argued that they reflect limited norms. Criticisms of this nature allege that international rights do not speak with a broad enough voice and, as a result, do not reflect the experiences or cater to the needs of those who have less influence in the institutionalised space in which norms are created. According to this line of reasoning, when rights are devised those who are vulnerable to oppression are less likely to dominate the meaning of rights, despite the ever-broadening spectrum of rights guarantees. Instead, it is Western, white men (and latterly, women) who have largely dominated the process of rights definition and implementation. This is reflected in the content of rights, which are less likely to represent the lives and needs of those who are the 'other'. This omission has bearing on the utility of rights; as Navanethem Pillay, former UN Commissioner for Human Rights puts it:

*... the opposite of marginalisation, discrimination and neglect is not only equality in rights and opportunities, but also the ability to make one's voice be heard and counted.*<sup>341</sup>

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<sup>341</sup> Navanethem Pillay (then) UN High Commissioner for Human Rights, 'What are Human Rights For?' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law*, (OUP, 2014) 4.

This suggestion goes to the heart of the promise of rights and also to the realisation of that promise in practice. To have real authority and effect, rights must reflect the lived experiences of all human beings. As this work will seek to confirm, concern that rights fail in this regard is becoming more audible.

Human rights can also be criticised outside of their substantive limitations. While the recommendations of various human rights committees are considered highly authoritative and apply pressure on states to act responsibly, they are not binding or enforceable in the ordinary sense.<sup>342</sup> Despite the promise of tangible rights standards, their effect can be limited in practice and states can—and do—ignore the recommendations of the committees.<sup>343</sup> Aside from the limited extent of supervision, rights are also weakened by the slow speed of international oversight in responding to human rights crises because it is a system based on conventions, signature, ratification and reporting. More substantively, concern also exists over the growth of human rights standards, and the potential as a result for rights to become weak and uncertain, rather than strengthened, by their very breadth.<sup>344</sup> While modern rights standards provide useful supervision and guidance, they have undeniable limitations. These limitations exist at the domestic level too. Despite the benefits offered by the HRA, it is not supreme law and cannot be used to strike down conflicting domestic laws. Neither is it entrenched; it can be repealed in the same way as any other statute so that parliamentary sovereignty is preserved. The appetite at the time of writing for exactly that type of repeal adds weight to the reality of this threat in practice, particularly following the United Kingdom's decision to leave the broader European project.

While it is not possible to canvass all rights on which displaced, additional wives might seek to rely, the following analysis tests the efficacy of specific, relevant rights protections, to see

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342 The remit of each Committee is outlined in the relevant treaties, as amended.

343 For a comprehensive catalogue of human rights violations since the ECHR, see *Boaventura De Sousa Santos, Towards A New Legal Common Sense: Law Globalization and Emancipation* (CUP, Cambridge 2002) 263-268.

344 Since the adoption of the UDHR, the UN treaty system has grown exponentially with a vast body of human rights material, comprised of hundreds of declarations, conventions, recommendations and comments on a broad range of human rights topics from basic human rights guarantees to those which cater for specific needs of refugees, women, children, migrant workers, indigenous rights, disability rights and other matters, available at the United Nations Treaty Collection <[https://treaties.un.org/PAGES/Content.aspx?path=DB/titles/page1\\_en.xml](https://treaties.un.org/PAGES/Content.aspx?path=DB/titles/page1_en.xml)> accessed 23 April 2017.

whether the voices of marginalised women are reflected in their content, and if not, why that is so.

### 4.3.1 The Efficacy of Refugee Rights

#### 4.3.1.1 The Scope of Human Rights for Refugees

The Refugee Convention forms the centrepiece of international refugee protection today.<sup>345</sup> In this regard, the Refugee Convention is premised on the basic understanding that all human beings should enjoy fundamental rights and freedoms, and that being forced to flee or located in a particular state ought not to limit an individual's human rights. The claimant envisaged by this research is not necessarily herself a Convention refugee, but a woman whose husband has successfully claimed refugee status on one of the Convention grounds and who is now settled in the United Kingdom. For this woman, it is a right to family reunion which is sought—a right the Refugee Convention does not recognise.

Avoiding family separation has been described by one well-known refugee law academic as a 'critical imperative' for those who have been granted refugee status and who are living in relative safety. It undoubtedly means even more to those left behind in refugee settings, in much more precarious conditions.<sup>346</sup> As already explained, in acknowledging the importance of the principle of family unity in the refugee context, the Final Act of the Conference of Plenipotentiaries which adopted the Refugee Convention recommended that governments take the necessary measures to protect the family unit.<sup>347</sup> Although not included in the final

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345 Protocol Relating to the Status of Refugees gave the Refugee Convention universal coverage and ensure it was no longer restricted to refugees in need of assistance before 1 January 1951, or refugees only in Europe. The right of persons to seek asylum from persecution is contained in UDHR, Article 14 and ECHR, Article 18. Refugee Convention, Article 1. A nexus must be established between the persecution and the Convention ground. On the Refugee Convention generally, see Guy Goodwin Gill, *The Refugee in International Law* (3rd edn OUP, 2007), James Hathaway (n 313).

346 James Hathaway (n 313) 533. Note there is actually also no specific right to settlement itself in the Refugee Convention, or any other human rights instrument. But states generally do allow for this.

347 Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (25 July 1951) <<http://www.unhcr.org/protection/travaux/40a8a7394/final-act-united-nations-conference-plenipotentiaries-status-refugees-stateless.html>> accessed 23 April 2017. The Conference agreed to take "... the necessary measures for the protection of the refugee's

draft of the Convention, this sentiment is also reflected in the UNHCR Handbook, which states:

*“If the head of a family meets the criteria of the [refugee definition], his dependents are normally granted refugee status according to the principle of family unity ... as to which family members may benefit from the principle of family unity, the minimum requirement is the inclusion of the spouse and minor children ... the principle of family unity operates in favour of dependents and not against them.”*<sup>348</sup>

The suggestion from the Conference is also reflected in various UNHCR Executive Committee Conclusions on family protection for refugees, which underline the need for the family to be protected and stress that every effort should be made to ensure the reunification of refugee families.<sup>349</sup> Other human rights treaties also affirm the central status of the family,

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family especially with a view to ...[e]nsuring that the unity of the refugee’s family is maintained.” The Conference also expressly affirmed the “essential right of the refugee” to family unity. Hathaway (n 313) 541 describes this as a “... powerful affirmation of the responsibility of states to avoid actions which might disturb the unity of a refugee’s family.” He considers at 543 whether the Conference recommendation is customary international law, and concludes it may be, because it has inspired UNHCR resolutions and states have regularly affirmed the family as the fundamental unit of society, and a unit which should be respected. Hathaway continues at 545, saying there is little doubt there is ample material to support *opinio juris* for recognition of a customary legal norm to protect the family unity of refugees, although it is limited. No clear idea of what a family unity is exists and is more likely the state has an obligation not to interfere with family unity rather than an obligation to reunite families. This is also what state practice seems to indicate and support. The reference to the ‘right’ to family reunion referred to at (n 300) during House of Commons debates, (rather than it being a privilege) it remains difficult to say that there is a customary international law right to family unity. Even if that could be argued successfully, whether that includes polygamous families is doubtful.

348 UNHCR, Handbook (n 295) 184, 185, 187.

349 See in particular UNHCR Executive Committee Conclusion ‘Protection of the Refugee’s Family’ (No 88, 8 October 1999) at paragraph (b)(iii) <<http://www.unhcr.org/excom/exconc/3ae68c4340/protection-refugees-family.html>> accessed 23 April 2017; UNHCR Executive Committee Conclusion ‘Family Reunification’ (No 24, 21 October 1981) <<http://www.unhcr.org/excom/exconc/3ae68c43a4/family-reunification.html>> accessed 23 April 2017; UNHCR Executive Committee Conclusion ‘International Protection’ (No 85, 9 October 1988) <<http://www.unhcr.org/excom/exconc/3ae68c6e30/conclusion-international-protection.html>> calling on states to consolidate their procedures for family unity and reunification in a “... legal framework to give effect at the national level to a right to family unity for all refugees, taking into account the human rights of the refugees and their families.” UNHCR Resettlement Handbook (1996) at IV(12) “... there is virtually universal consensus in the international community concerning the need to reunite members of [the] family nucleus.” See also, United Nations Declaration on the Human Rights of Individuals who are Not Nationals of the Country They Live In (Adopted 13 December 1985, UNGA Res. 40/144) <<http://www.un.org/documents/ga/res/40/a40r144.htm>> accessed 23 April 2017, Article 5(4) “Subject to national legislation and due authorization, the spouse and minor or dependent children of an alien lawfully residing in the territory of a State shall be admitted to accompany, join and stay with the alien”, so that any ‘right’ that might be claimed is subject to national legislation and the sovereign

and treaty bodies have alluded to a responsibility on the part of states to ensure the family unity.<sup>350</sup>

As a result, most states recognise the chaos that is particularly prevalent in the refugee setting, often resulting in families being separated, and will honour the importance of family as a fundamental group which is entitled to some protection in the refugee context. The precise terms of reunion are usually determined according to domestic immigration provisions. As already explained, for polygamous wives reunion is limited in the United Kingdom by the Immigration Act and accompanying Immigration Rules, which restrict the number of wives who can be granted leave to enter and remain as the spouse of a sponsor.<sup>351</sup> While, more recently, states have increasingly been willing to permit reunification for unmarried partners and gay spouses on the basis of their family relationship, the very same states that have extended their family reunification rules to incorporate a wider definition of ‘family’ have not inclined to do so with plural families.

In the European Union, although the proposal prepared by the European Commission suggesting a Directive on family reunification expressly recommended that “...special attention” be paid to the situation of refugees so that they may benefit from “more favourable conditions” to be able to exercise their right to family reunification, most states are expressly prohibited from recognising polygamous families for this purpose by the EU Family Reunification Directive which states:

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will. Also, the European Social Charter (Revised) (adopted, 3 May 1996, entered into force 1 July 1999) ETS 163, Article 19(6), states must “... facilitate as far as possible the reunion of family.” This version ignored and changed an earlier draft which suggested states should grant the right to family reunification.

350 ICCPR, Article 17 and Article 23, which affirms the central status of the family; ICESCR, Article 10(1) affirming the same. The Human Rights Committee has said the ‘possibility of living together’ could be defined as extending to the adoption of measures by the state to ensure the unity of reunification of families, See UN Human Rights Committee ‘General Comment 19 ‘Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, UN Doc HRI/GEN/1/Rev 7 (1990) at 149, paragraph 5. Still, none of these advocates for such a right for additional, polygamous wives. Even if a right to family reunification might be argued, the scope of the right is likely to be limited.

351 S 2 Immigration Act 1988, paragraph 278-280 Immigration Rules.

*In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse.*<sup>352</sup>

While the United Kingdom has opted out of this particular Directive, creating the potential for domestic immigration law to take a more flexible approach to polygamous families, British immigration rules adhere to the same principle as the Directive.<sup>353</sup> Additional polygamous wives are universally excluded and the prohibition on their entry to the United Kingdom is applied rigidly. Although NGO reports have suggested the United Kingdom be “flexible and responsive” in cases where family relationships are atypical, especially in cases where women and children are likely to be vulnerable to violence or exploitation in the refugee setting, resistance to understanding the ‘family’ as anything beyond a nuclear family remains firm.<sup>354</sup> This is deeply problematic in practice for a range of refugees whose families are not constituted in the traditional way. The exclusion operates without concern for the lived experience of wives who are left to face insecurity and danger, and whose living conditions day-to-day

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352 ‘EU Family Reunification Directive’ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12-251/18, Article 4(4). It also provides states with the freedom to limit the reunification of any children the additional spouse may have with the original Refugee sponsor. The Directive also states at paragraph 11, “The right to family reunification should be exercised in proper compliance with the values and principles recognised by the Member States, in particular with respect to the rights of women and children; such compliance justifies the possible taking of restrictive measures against applications for family reunification of polygamous household.” In *Chakroun v Minister van Buitenlandse Zaken* [2010] ECR I-117, the Court of Justice of the European Union confirmed the Directive must be interpreted in accordance with human rights (the right to a family life being the most obvious). This case did not consider the issue of polygamy directly, but rather, whether a family relationship which arose after the resident’s entry would be relevant for purposes connected with the Directive. For the earlier proposal recommending that refugees be treated more favourably, see Commission of the European Communities ‘Proposal for a Council Directive on the Right to Family Reunification’ (1999) 638.

353 The basis for the United Kingdom’s decision to opt out of the Directive on family reunification is not clear, but it has been attributed to a desire to ensure the United Kingdom is not obliged to comply with any EU law which is not in line with the United Kingdom’s own border policies, including any amendments to the Directive in the future. See Wright, Leila and Larsen, Christine, ‘European Migration Network (EMN) Family “Reunification Report”: Small Scale Study IV (Report)’, 5. This is likely to appeal to a home audience with regard to concerns over immigration and the desire at least to give the impression of Britain being unfettered in its sovereign right to manage migration matters.

354 Jacob Beswick, British Red Cross, ‘Not So Straightforward: The Need for Qualified Legal Support in Refugee Family Reunion’ (Report) (2015). The report recommends the Home Office be flexible and responsive for cases which were atypical (although polygamous marriages were not expressly included in the list) and recommended further the diverse needs of refugees’ families ought to be acknowledged, including by standing by commitments to protect women and children who are more likely to be vulnerable to violence or exploitation in crisis settings.

arguably ought to provide a prompt for reconsideration. Despite that, when states are called on to make “every effort” to reunite families, polygamous families, be they refugees or not, do not benefit from that effort and the protection from harm it might otherwise provide.<sup>355</sup>

#### 4.3.1.2 The Trouble with Refugee Rights

Given the absence of an express right to family reunification and the unity among Western states in limiting family reunion, including for refugees, it is perhaps reasonable to ask: why should human rights standards offer help to polygamous families who are denied family reunion? Given that the state is plainly able to exercise its sovereignty as it sees fit in this regard, one might ask how excluding polygamous wives can be construed as a problem in need of fixing?

At the centre of the United Kingdom’s treatment of polygamous families is a tension between the sovereign right to control immigration and the duty of each state to respect the human rights of all individuals, including those who are non-citizens. The particularly vulnerable position of refugees throws this tension into sharp relief. The importance of family unity to women who are much more likely to be exploited or abused by being left on their own highlights their need for the support of states and the human rights community. By rejecting these women on the basis solely of their marital status, states make a conscious choice to ignore their fate; a decision they are entitled to take entirely unhindered by rights obligations.

Although the transnational abandonment of additional wives is effectively approved by international law, the impact on those affected provides a strong prompt to reassess their unconditional exclusion. By their very nature, the rights sought by those who are minorities and those who are ‘other’ are more likely to be controversial and therefore also more likely rejected by the officers of the majority, who act on their own notion of ‘rights’, and in this case, ‘family’.<sup>356</sup> The idea that the law is neutral has long been questioned, however, and any recourse to rhetoric which simply cites the will of the majority, as expressed in overarching international legal principles and imposed by the dominant group on those who are in a much

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<sup>355</sup> The reference to ‘every effort’ comes from the UNHCR Executive Committee Conclusion No 24 on Family reunification (n 349).

<sup>356</sup> Dworkin, R *Taking Rights Seriously* (Bloomsbury, London, 1977) 204.

weaker position, must be challenged if rights are to remain credible.<sup>357</sup> As one highly respected rights theorist has suggested, when the division between the will of those who are most powerful and those who have little power is most broad and deep—as it is with regard to the treatment of polygamy—this is precisely the time that the promise of the majority to respect the dignity and equality of the minority must be put to the test, otherwise the law will simply become “... a re-statement of the majority view of the common good”.<sup>358</sup>

In responding to this elevation by Western states of their own conceptions of ‘family’, legal pluralists have recommended that those who govern take a ‘cross-societal’ approach where different communities co-exist.<sup>359</sup> In this regard, Prakash Shah has noted the importance of considering *why* the law is expressed in a particular way (i.e. to exclude polygamous families), rather than simply accept *what* the law says.<sup>360</sup> In his view, changing the focus in this way reveals invidious and deceptive local agendas. The judgment of non-Western marriages by the United Kingdom legal order and the failure of rights to offer any alternative is, according to Shah, inextricably intertwined with the historical dominance of Christianity and an idea of ‘family’ which is distinctly Western. For these reasons, according to Shah, the legal treatment of polygamous wives might be described as a sort of lawlessness brought about administering the law on family reunion in a way which is tied to ‘acceptable’ notions of culture and which has no connection whatsoever with justice for those affected, an outcome which is all the more ironic in the context of human rights.

The problem with the formal response to non-traditional families is illustrated by the *Bibi* case, a claim to the European Court of Human Rights by a daughter living in the United Kingdom, whose mother was prevented from enjoying family reunion because of the polygamous nature of her marriage to the girl’s father.<sup>361</sup> In dismissing the applicant’s claim the Commission’s

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357 Dworkin (n 356) 205, writing in 1977 says “The bulk of the law – that part which defines and implements social, economic and foreign policy – cannot be neutral.” In this regard, says Dworkin, the law is simply a re-statement of the majority view of the common good.

358 Dworkin (n 356) 205.

359 Lambert (n 299) 30, uses the term ‘cross-societal’ in the context of family.

360 Shah (n 11).

361 *Bibi* (n 192). Similar doors have been closed across Europe, including France (n 223) and Germany (n 75) and also in Italy where, as late as 2009, cases existed where the court had granted a right for a mother to enter and remain, including where a husband had



reasoning in this case speaks precisely to the concern expressed by Shah, with its emphasis on the 'legitimate aim' of preserving the Christian-based monogamous culture dominant in the United Kingdom.<sup>362</sup> Similar doors have been closed across Europe, including France and Germany, which have already been discussed, and also in Italy where, previously as late as in 2009, cases had existed where the court had granted a right for a mother to enter and remain, including where a husband had already settled with a separate wife.<sup>363</sup> Although the family in *Bibi* were not displaced or seeking refuge, the judgment provides evidence more generally that efforts to deny polygamous families any right to reunite is heavily connected with the desire of the state to promote a Western, Christian and white agenda over the needs of individual claimants. In justifying the interference with the right to a family life, all states in Europe need do is effectively point to their preferred definition of 'family' as a legitimate aim, so that interference with polygamous family life is justified, despite the marriages which bind them being entirely valid. In this regard, the effect of human rights is to condone the state's behaviour in denying family reunion for Muslim families, according to the Christian normative consensus that dominates in the region.

The disjuncture between the universal rejection of polygamy in immigration and the recognition of polygamy in family and other domestic matters (as discussed in Chapter 2) adds some weight to the legal pluralist criticism expressed by Shah. If relative harm is considered domestically regarding the recognition of polygamous marriages, why are harms not balanced at all in immigration law, in particular as that is applied to refugees? If the law, and especially the law designed to protect refugees and promote human rights, does not assist those who evidently need it, and that failure can be contrasted with the treatment of the same category of people in domestic practice, such inconsistencies must at the very least provide a motive

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already settled with a separate wife. (Corte di Appello di Torino, 18 aprile 2001, tribunale di Bologna, ord. 12 marzo 2003, Tribunale dei minori di Bari, 20 agosto 2002, Corte di Appello di Bari, decr. 31 dicembre 2001). Law n.94 15 July 2009 has subsequently closed that door.

362 In justifying an interference with a right, states are not able to point to any aim they consider worthy in seeking to claim a 'legitimate aim'. In fact, the ECHR itself sets out parameters within the content of each right stated in the convention, including national security, public safety, the protection of health or morals, for example. In a similar case at the ECHR, the government of the Netherlands was entitled to exclude the child of an additional spouse on the basis doing so was in pursuance of a legitimate aim (EA and AA v the Netherlands (App. No. 14501/89) ECHR 6 January 1992 confirming the suggestion that states are not ordinarily required to guarantee Convention rights where doing so would interfere with their with their own legal order.

363 France and Germany and Italy (n 361).

for critical re-consideration. The disjuncture between the law and the limited value it very often provides to displaced populations in practice reveals a disregard for transnational families who become trapped in a socio-legal reality which does not acknowledge them. No express right to family reunification can be claimed by them and sovereign will, backed up by a discernable lack of international obligation on states to do anything differently, means the reality of daily life faced by polygamously married refugees is ignored. In this way, official decision making by the state and the international human rights community reinforces the ‘othering’ of certain categories of people.

Shah uses the *Singh* case to highlight this ideological dominance in practice.<sup>364</sup> In this case, an ethnic minority adoption was reinterpreted in terms of Western legal categories to make it valid, then rejected in the immigration context anyway, and—given the severity of the impact on those affected—subsequently challenged successfully using Western inspired human rights claims.<sup>365</sup> The same sort of ‘othering’ and dominance undoubtedly also occurs in the formal treatment of polygamous wives. However, unlike the adopted child in *Singh* who eventually found relief in the form of rights, polygamous wives are doubly disadvantaged. Not only does domestic immigration law continue to deny them family unity, regardless of the impact, for them, universal rights offer no help at all.

While the arguments made by Shah and legal pluralists like him are helpful in explaining how domestic laws and international human rights fail to protect the interests of women like those who are the focus for this work, the factors behind the relative positions of power in this context also require consideration.<sup>366</sup> Here postcolonial critiques like that of Boaventura de Sousa Santos provides a historical reference point for the international system of rights, firmly locating their current content in a background of colonialism and dominance, as a kind of ‘monument of Western culture’.<sup>367</sup> In this connection, de Sousa Santos alleges that modern

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364 *Singh v Entry Clearance Officer, New Delhi* [2004] EWCA Civ 1075, discussed in Prakash Shah, ‘Diasporas as legal actors: Implications for established legal boundaries’ (2005) 5 *Non State Actors and International Law* 153.

365 *Singh* (n 364). In this case, the Court of appeal considered that the immigration authorities’ refusal to recognise an inter-family adoption in India was an interference with Article 8, the right to a family life and violated the Human Rights Act 1998.

366 De Sousa Santos (n 343) 257.

367 De Sousa Santos (n 343) 257, 280.

rights discourse reflects a 'legal orientalist' perspective, which separates the West from the rest and confirms the superiority of Western nation states on the international stage. The legacy of legal orientalism, whereby a framework was constructed in the context of colonial endeavours to confirm the inferiority of non-Western legal systems, marginalising other societies, is an oppositional rhetoric that directly informs the development of national and international laws.<sup>368</sup> According to this reasoning, the very concept of human rights relies on a specifically Western way of thinking and living which is distinct and which does not reflect other ways of life, or any other culturally different concept of 'human dignity'. In support of his suggestion, de Sousa Santos stresses the importance of reconstructing the notion of legality to take account of locality, nationality and globalisation, pointing to the fact that founding human rights documents were drafted without equal participation by other peoples so that their contents privilege individual, civil and political rights over collective, economic and social rights shaped by the economic, political and cultural priorities of the West.<sup>369</sup> As a result, he questions the rallying cry of universal human rights, which he refers to as, quite simply, a disguised, globalised, localism.<sup>370</sup>

Both de Sousa Santos' postcolonial critique and that of the legal pluralists reflect a perspective on the treatment of refugees that highlights the notion that law cannot be separated from society. Rather the law is shaped by culture, politics and economics, and, in a circular relationship, law shapes the epistemological foundation that informs culture, politics and economics thereafter.<sup>371</sup> In that regard, because law is a 'cultural artefact', as the socio-legal academic, Eve Darian Smith, has described it, it is illustrative of cultural assumptions which are deeply embedded in any given society.<sup>372</sup> It is self-evident, however, that those who make and enforce laws do not very often view law in this way. Instead, a positivist account is presented by those in power of law simply as an instrument to regulate and control society, constituted by an executive branch with a mandate to do so, for the purpose of protecting individuals and their property from harm. As Darian-Smith has suggested, such simple

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368 Darian Smith, Eve, *Laws and Societies in Global Contexts* (CUP, Cambridge 2013) 50.

369 De Sousa Santos (n 343) 271.

370 De Sousa Santos (n 343) 271.

371 Eve Darian Smith (n 368) 41.

372 Eve Darian Smith (n 368) 41.

assumptions about the nature of the law have long seemed uncomplicated because societies and the laws governing them were generally uniform in nature. With increased globalisation and human movement (forced or otherwise), however, societies are increasingly diverse and such assumptions are no longer reliable.<sup>373</sup>

Applying pluralist, postcolonial and socio-legal critiques specifically to experiences of the displaced women contemplated by this research, it is possible to construe their treatment in refugee law as something which is unjustified and deeply problematic, even if it might also be expected. By re-understanding the origins and impact of international law in this way, human rights can be seen as constitutive of on-going Western cultural assumptions. Previously invisible 'orientalising structures' become capable of being re-imagined so that their typical ignorance of certain categories of people becomes clear.<sup>374</sup> Instead of viewing additional wives as victims or perpetrators of an unacceptable form of marriage who can legitimately be excluded whatever the cost, re-imagining the law makes it possible to see them instead as outsiders whose legitimate family arrangements do not meet requisite (Western) standards and whose needs are subordinated entirely to the priorities of the (Western) state.<sup>375</sup> By switching from an ordinary perspective on the purpose and function of the law to one which privileges the relationship between law and culture, a fresh perspective on the lived experiences of additional polygamous wives is gained. The precariousness of their situation in fleeing the danger posed by one state while hoping for the generosity of another illustrates the problem of rights claims which may be made against the state, but which are also created, agreed to and granted (or not) by the state. The ambivalence of the United Kingdom towards the displaced women contemplated by this research, far from reflecting a reasonable sovereign response to an objectionable form of marriage, can be re-understood as the manifestation of an unforgivable bias. Here, women seeking refuge and by definition in need of the protection of the state are neglected by apparently universal human rights guarantees which treat them as

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373 Eve Darian Smith (n 368) 42, quotes the World Migration Report which says in 2010 there were 150 million migrants and by 2013 the figure had risen to 214 million as people flee conflict and insecurity, pursue jobs and hope for a better standard of living. The same report also suggests the figure could grow to 405 million by 2050.

374 The term 'orientalising structures' comes directly from Eve Darian Smith (n 368) at 50.

375 De Sousa Santos (n 343) 257.

“sociological untouchables” simply because of Western, cultural objections to their marital status.<sup>376</sup>

### 4.3.2 The Efficacy of Women’s Rights

#### 4.3.2.1 The Scope of Human Rights for Women

The recognition of women’s rights as human rights has been a recent phenomenon, representing the increasing scope and ambition of the human rights movement.<sup>377</sup> Before addressing the impact of women’s rights, it is worth explaining the purpose in thinking of rights for women as something different from the general human rights project. Inherent in the nature of rights is their promise of universal protection without distinction, as expressed in the earliest international human rights conventions. So, what is the benefit in thinking specifically of the rights of women?

The disappointing truth is that, despite the long existence of rights and non-discrimination guarantees, women continue to be subject to gender-specific inequality, abuse and oppression.<sup>378</sup> They are less likely to hold positions of power in the public sphere than men, and their interests in the private sphere have historically not been the focus for those who draft domestic or international law. In practice, this means they are more likely to be denied equal access to a range of rights, including in education, employment and health care. According to one human rights academic, the “grim reality” is that women are generally still far worse off than men in relation to almost every indicator of social well being.<sup>379</sup> Moreover,

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<sup>376</sup> De Sousa Santos (n 343) 257.

<sup>377</sup> Steiner, Alston and Goodman (eds) *International Human Rights in Context; Law Politics, Morals* (3rd Edition OUP, 2008) 175.

<sup>378</sup> Diane Otto ‘Women’s Rights’ in Moeckli, Daniel, Shah, Sangeeta and Sivakumaran, Sandesh (eds) *International Human Rights Law* (OUP, 2014) 345.

<sup>379</sup> Otto (n 378) 347. For an overview of women’s rights as human rights see Charlotte Bunch ‘Women’s Rights as Human Rights: Toward a Re-vision of Human Rights’, (1990) Vol 12 No 4 *Human Rights Quarterly* 486, Gayle Binion ‘Human Rights: A Feminist Perspective’ (1995) 3 *Human Rights Quarterly* 509, and for a transnational critique of women’s rights as human rights see, Inderpal Grewal, ‘Women’s rights as human rights’: Feminist practices, global feminism, and human rights regimes in transnationality’ (1999) *Citizenship Studies* 3(3) 337. For a discussion on women’s rights and culture, see Monique Deveaux, *Gender and Justice in Multicultural Liberal States* (OUP, 2009), Chapter 3 ‘Women’s Rights as Human Rights’ 54.

women's inequality is still more often thought of as 'natural' and in some cases, may even be perpetuated by the limited content of human rights themselves. As a result, there is an on-going basis for articulating the idea of 'women's rights' and the need specifically to promote women's interests remains.

In 1993 the Vienna World Conference on Human Rights saw the mobilisation of women's rights activists to enlist formal support to promote women's rights. Aiming to shine a light on women's experiences, many of which have long been considered private and outside the reach of public international law, women's rights campaigners successfully sought the acknowledgement of 'women's rights as human rights'. This 'call to action' was intended to acknowledge that women's rights have not historically been prioritised, resulting in gaps in human rights protection.<sup>380</sup> The conference identified tangible methods for placing women at the centre of human rights discourse like 'gender mainstreaming' to assess the implications of any proposed law or policy and ensure it reflects the diverse experiences of women and men.<sup>381</sup> The purpose was to address the historic ignorance of women's lived experiences, so that the lives of women might have more influence in informing law and policy and reduce structural inequalities. In addition, the Beijing Declaration that followed the conference focused on twelve specific aims to implement women's rights and achieve women's empowerment, a significant achievement in articulating women's rights as human rights.<sup>382</sup> In this regard, the Beijing conference signalled a shift in the approach to women's rights, laying a clear foundation

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380 Office of the High Commission for Human Rights, 'Women's Rights are Human Rights' (n 17). As First Lady, Hillary Clinton first described the call to acknowledge women's rights as human rights in her speech at the Beijing Women's conference; Hillary Rodham Clinton, 'Women's Rights are Human Rights' (speech to the United Nations Fourth World Conference on Women Plenary Session in Beijing, China, 5 September 1995) <http://www.americanrhetoric.com/speeches/hillaryclintonbeijingspeech.htm> accessed 23 April 2017).

381 The World Conference on Human Rights, Vienna Declaration and Programme of Action (12 July 1993) A/CONF. 157/23, paragraph 18. Note, at paragraph 38, the Declaration also calls for "...the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism."

382 United Nations, Beijing Declaration and Platform of Action (adopted at the Fourth World Conference on Women, 27 October 1995), endorsed by General Assembly Resolution 50/203, 22 December 1995 <<http://www.un.org/womenwatch/daw/beijing/platform/>> accessed 23 April 2017 and 'Women's Rights are Human Rights' (Report) (n 380) 14.

for concrete methods to eliminate gender discrimination within the broad spectrum of the framework of international human rights standards.<sup>383</sup>

The seminal commentary on the impact of international legal boundaries on women by Chinkin and Charlesworth also emerged around the same time. The foreword, by Elizabeth Evatt, a former member of the UN Human Rights Committee, reflects the general tone of the discussion on women's rights, in suggesting that women had not been served well by laws largely shaped by men and which remain ignorant to women's concerns.<sup>384</sup> Chinkin and Charlesworth were among the first to apply this critical insight to expose a distinct and yet hidden gender bias in international law making. As Chinkin and Charlesworth pointed out, women form over half the world's population, although they had historically had little to do with shaping the international legal order.<sup>385</sup> In their view, legal standards continued to be built on a gendered platform, reflecting what they called 'male priorities' and leaving women and their concerns on the margins.<sup>386</sup> Like feminist critiques in other areas of the law, theirs was largely a critique of inherent inequality, noting the absence of women in law-making roles and the effect of that absence in the vocabulary of the law. According to this reasoning, a deficit of women results in laws that have the appearance of being gender neutral, but which in fact reinforce gender stereotypes to ensure the continued exclusion of women from the content of law and its protection.<sup>387</sup> At the heart of their assertion was the idea that;

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383 Beijing Platform for Action (n 382). In general terms, in spite of this clear and strong commitment by the human rights establishment to privileging the concerns of women, subsequent reviews of women's rights have confirmed that de jure and de facto equality between men and women has not been achieved in any country in the world to date, 'Women's Rights are Human Rights' (Report) (n 380) 14, referencing reviews of the Platform for Action, carried out in 2005 and 2010, respectively.

384 Elizabeth Evatt, Member of Human Rights Committee, in the foreword to Chinkin and Charlesworth (n 39) where she refers to the fact the law has not always served women well and discusses how the legal system has been shaped by men, denying women basic rights. More recently, the most obvious examples of sexism have been removed (things like restrictions on voting rights, the introduction of legislation to demand equal pay, other employment rights for women and more gender sensitive approaches to rape, especially inside marriage, but she maintains, the law is still gender biased.

385 Chinkin and Charlesworth (n 39) 1. Sex and gender matter in law and "... the absence of women in the development of international law has ... legitimated the unequal position of women around the world rather than challenged it." In their view, as a result, legal boundaries reflect this absence of women.

386 Chinkin and Charlesworth (n 39) 19.

387 Chinkin and Charlesworth (n 39) 49.

*... [The participation of women] in the development of international legal principles is minimal and the international legal order appears impervious to the realities of women's lives.*<sup>388</sup>

Other well-known feminist critics also added their views to the gender assessment of human rights around this time. Perhaps the most well-known radical feminist academic and activist, Catharine MacKinnon, described the entire system of rights as predicated on the subordinated status of women, allowing their inequality to remain invisible, as though the ignorance of their lives and the marginalisation of their concerns was entirely neutral, and normal.<sup>389</sup> In this regard, radical feminists joined with their liberal feminist counterparts to express their view of international human rights law as paradigmatic of gender inequality and male dominance.

In effect, the arguments of both mainstream liberal and radical feminists amounted to the same thing in terms of women's rights; rights have not only offered false hope to women, they perpetuate women's inequality and subordination by neither recognising their lived experiences, nor including women in law making. Although the calls for action arising out the Beijing conference on women were naturally much less disparaging of human rights *per se*, they also demanded that the entire system of rights to consider and reflect the unique lives and needs of women in order to redress a long-standing gender imbalance, and for rights to be more effective.

#### **4.3.2.2 The Trouble with Women's Rights**

Despite the importance and wide acceptance of mainstream feminist suggestions regarding the re-framing of international human rights laws to better reflect women's needs, critics have emerged, highlighting problems with traditional feminist involvement in governance and the scope of international law. While CEDAW has offered women more wide-ranging grounds

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<sup>388</sup> Chinkin and Charlesworth (n 39) 48.

<sup>389</sup> Catharine MacKinnon, *Are Women Human? And Other International Dialogues* (HUP, 2007) 149 "Largely beneath notice in [the rights] tradition has been the status of women ... socially subordinated to men and excluded and ignored, marginalised ... Women's enforced inequality has been a reality on which all these systems are materially predicated so seamlessly it has been invisible."



for the protection of their interests, it has also been criticised both for not going far enough in defining women's concerns, as well as marginalising women's rights and allowing the 'mainstream' human rights community to continue to ignore them. Apprehension over the universalised construction of 'women' and their oppression has figured prominently in this regard, as the movement to acknowledge 'women's rights as human rights' has become representative for some of simply an alternative form of dominance, resulting in more entrenched oppression. Critics include Diane Otto, who has criticised women's rights for being limited in that they still require a comparison with men, they assume married heterosexuality is the norm and they do not go far enough in acknowledging multiple and intersectional discrimination.<sup>390</sup> She is also concerned at the limited focus on gender based violence. Although CEDAW can be considered a dynamic document which ought to be interpreted to allow for evolving women's needs, it continues to be criticised today by some, for representing an out-dated urge to protect women's interests rather than recognise their rights.

In a similar vein, in an early critique of the momentum behind 'women's rights as human rights', Inderpal Grewal writing in 1999 insightfully observed that such a call misrecognises the geopolitical context of international rights standards and the relationships of power that are sustained as a result.<sup>391</sup> Describing the modern system of international human rights as a 'regime' that has apparently come unequivocally to represent what is morally good and right for all, Grewal cautions against using the vernacular of human rights for women's benefit, recommending the advantage in focussing on concepts of economic and social justice to achieve more productive outcomes for women.<sup>392</sup> In this regard, Grewal expresses her deep concern at the use of:

*[H]uman rights as a tool for addressing oppression [so] ...that to practice a critique of such discourses becomes amazingly difficult. Yet, feminist critique of a regime of knowledge that has been so naturalized is an urgent necessity, since it is*

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390 Otto (n 378) 347.

391 Inderpal Grewal (n 379) 337.

392 Grewal (n 379).

*here that we can begin to dismantle the operations of power in relation to the  
[emerging] knowledge formation ...*

Among those picking up on Grewal's call for feminist critical engagement with the language and project of women's rights are 'governance feminism' critics, or those who have expressed deep concern at the immersion of feminist ideals within human rights institutions so that feminists have effectively 'come to power' as part of the establishment. Critics of such establishment feminists allege that, immersed in their new-found status, those who promote women's rights as part of the ordinary human rights movement very often fail to connect with the lives of women who are not like them. According to this suggestion, mainstream feminists in the corridors of power operate from a position of such privilege that women who are not part of the traditional feminist movement, those who are less powerful and less well-represented, are unlikely fully to benefit from typical feminist engagement with law and rights.<sup>393</sup> Adding insult to injury, both men and established dominant women are also accused of complacency about the extent to which legal standards reflect their own self-interest. As a result, as far as governance feminist critics are concerned, feminist knowledge has become a tool for the state, a convenient reference point that can be called 'expertise', which informs human rights and which can be used to justify the approach which best suits those in power, who rule on gender relations and gender equality.<sup>394</sup>

Janet Halley, a leading advocate of governance feminist theory has, together with her close colleagues, identified two traditional feminist discourses which have been used by establishment feminists in shaping legal rules.<sup>395</sup> The first is that of liberal feminism, that early branch of feminist thought which emphasises formal equality between women and men, so influential in human rights circles. The second is radical feminism, which privileges the part played by male domination and the prioritisation of male values and needs, advocating a simple break with male-orientated choices for women's emancipation. While liberal and dominance feminist aims undoubtedly blazed a trail in unlocking the gendered door to international law by demanding that women be acknowledged and able to participate equally with men, the

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393 Halley and others (n 65) 335.

394 Halley, Kotiswaran and others (n 65) 377.

395 Halley, Kotiswaran and others (n 65) 377.

governance feminist critique espoused by Halley and her colleagues also recognises the extent to which these more traditional feminist discourses have been adopted and absorbed by human rights institutions, at the expense of other concerns.

This exclusion from the sphere of influence in international human rights of those women whose way of life doesn't fit inside traditional liberal equality boundaries is illustrated well by the controversy over veil and headscarf wearing, which provides a useful example of governance feminism in action and its capacity to have a profound effect on the lives of less powerful women. Writing about feminist engagement and veil wearing in France, Maleiha Malik reveals the unintended consequences of the subjugation by establishment feminists of less dominant and more often non-Western women over whether veils ought to be banned. As Malik points out:

*...French feminists with greater social, economic and political power attributed 'autonomy deficits' to less powerful adult Muslim women who chose Islamic veils and discounted the ways in which they may be able to exercise choice despite their structural disadvantage. The exercise of power on behalf of Muslim women rather than allowing them to speak in their own voice also had unintended consequence. It allowed French feminists to bifurcate the interests of women. On the one hand, the interests of French women who were a racial, cultural and religious majority were represented as a universal call for parité. On the other hand, the distinct claims by a smaller group of North African and Muslim women for accommodation of veiling were rejected as outside the acceptable frame of French feminist politics. This political strategy produced unintended consequences that are a recurring feature of feminist exercises of power that assume that they constitute progressive social reform on behalf of all women.<sup>396</sup>*

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396 Maleiha Malik, 'Governance Feminism in the French Republic: Veils, Parite and Feminists' in *Governance Feminism: Notes from the Field* (forthcoming). Malik's observations resonate in the context of the ECtHR and the veil and the headscarf, where a wide margin of appreciation has been offered to states who have argued that such customs are at odds with local values, so that the veil may legitimately be banned and the wearing of the headscarf is restricted in certain spaces. Bans have been instituted in some cases in spite of human rights advocates being against doing so (in France, while the Stasi Commission recommended a headscarf ban in schools, the National Advisory Commission on Human Rights (CNCDH) in France expressed its view, as have NGOs such as Amnesty International, of widespread bans as based on gender and religious stereotypes assuming all women who wear particular types of

The influence of governance feminism on the veil debate in France has been, according to Malik, to exclude Muslim women ever more from social, economic and political power, and not to encourage gender equality or provide marginalised women with better human rights protection.<sup>397</sup> Echoing the concern expressed much earlier by Grewal and Otto among others, regarding the necessity for a universal ‘sisterhood’ of sorts, a human rights imperative which applies without exception across transnational, cultural and other boundaries, the head covering debate is useful in showing traditional feminist engagement with the law can be detrimental for some.<sup>398</sup> It also highlights the corresponding necessity of the governance feminist critique in exposing the damage which mainstream discourse regarding women’s rights can cause to women—like those considered by this research—whose lives do not fit neatly inside traditional liberal boundaries.

#### 4.3.2.3 Women’s Rights and Polygamy

As outlined in Chapter 2 the CEDAW Committee has stated plainly its view of polygamous marriage as contravening a woman’s right to equality with men. The Committee was so convinced of the detriment of polygamy for women that it went so far as to say that any state whose laws permitted polygamy violated Article 5 of CEDAW, by failing to take appropriate measures to modify social and cultural practices which enforced the superiority of men over women.<sup>399</sup> In views which might be argued are reminiscent of the uncompromising harm of polygamy as expressed in early case law such as *Reynolds*, the CEDAW Committee has concluded that polygamy must always be discouraged.<sup>400</sup> In a statement on marriage and family

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dress are coerced to do so.). For a summary of relevant European case law see (n 63). The work of Diane Otto bears some relevance here, in pointing out that by selectively engaging in feminist discourse, states do not address the structural nature of inequality (Dianne Otto, ‘Power and Danger: Feminist Engagement with International Law through the UN Security Council’ (2010) 32 *Austl Fem LJ* 97).

397 Malik (n 396).

398 Grewal (n 379), 398 Otto (n 378). See also Choudhury ‘Empowerment or Estrangement’ (n 418) and ‘Beyond Culture’ (n 445). Also Ivana Radicic, ‘Feminism and Human Rights: the Inclusive Approach to Interpreting International Human Rights Law’ (2008) 14 *UCL Jurisprudence Review* 238.

399 CEDAW Committee General Recommendation 21 (n 152).

400 CEDAW Committee General Recommendation 21 (n 152) paragraph 14.

rights in CEDAW, the Committee recently reaffirmed its earlier view.<sup>401</sup> Expressing a degree of institutional exasperation almost ten years on from its initial pronouncement on polygamous marriage, the Committee noted with concern the persistence of polygamy, pointing to the grave ramifications it has for women's human rights and economic well being and calling again for its abolition.<sup>402</sup> The body with responsibility for setting the tone of human rights more generally, the Human Rights Committee, has also described polygamy as incompatible with equal treatment and a violation of the human dignity of women amounting to unequivocal discrimination that must be abolished.<sup>403</sup> Such forceful and absolute condemnation of polygamy by two of the main international treaty bodies with responsibility for the scope and implementation of human rights standards gives the appearance of a Western-oriented system of rights which views women in polygamous marriages as "... brutalised by their cultures, in need of rescue and rehabilitation by a civilising West."<sup>404</sup>

In the regional setting the disapproving tone taken in Maputo Protocol is also of interest. This regional human rights guarantee was formulated with wide participation from women's NGOs across a continent where polygamy is much more prevalent than in the West.<sup>405</sup> Although the final draft of the African Charter was watered down and its text does not condemn polygamy outright, it nonetheless provides additional evidence of a modern human rights document intended to protect the rights of women, and which expresses a clear preference for monogamy in women's best interests. Crucially, applying a governance feminist critique, the Maputo Protocol arguably benefits from the fact that local women's groups were heavily involved in bringing it to life. Far from being dictated to African women by the global North

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401 CEDAW Committee 'General Recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (2013) UN Doc C/GC/29.

402 CEDAW Committee 'General Recommendation on Article 16 (n 401).

403 UN Human Rights Committee 'General Recommendation 28' UN Doc CCPR/C/21/Rev1/Add 10 (2000). It is perhaps hard to reconcile the state's conflicts of laws obligation in international law to recognise perfectly valid foreign polygamous marriages, where the marriage is celebrated in jurisdiction which permits it and by citizens with no bar to doing so. Valid polygamous marriages are recognised by the United Kingdom government in non-immigration settings in part for this reason, where the harm caused by not recognising a marriage is greater than the harm thought to be caused by a polygamous marriage. This apparent contradiction, in international human rights law and the law of conflicts is interesting, but not within the scope of this thesis to discuss in detail.

404 Ratna Kapur 'Feminist Critiques of Human Rights' in Rhona K M Smith *The Essentials of Human Rights* (4th edition OUP 2010) 133.

405 African Charter (n 141) and Maputo Protocol (n 151). See also Fareda Banda (n 141) and Fareda Banda, 'Blazing a Trail: The African Protocol on Women's Rights Comes into Force' (2006) 50 CLJ 72.

and West, the Maputo Protocol is a document intended specifically to promote women's rights that was not only created in collaboration with local women's representatives, but suggested, drafted and finalised by them, in conjunction with local, inter-governmental partners.

#### 4.3.2.4 Why Women's Rights Get Polygamy Wrong

The concern that Malik and other academics have expressed over mainstream and institutionalised feminists hijacking the veil is useful, however, in highlighting cracks in the women's rights movement with regard to polygamy. While equality objections to the practice of polygamous marriage may appear undeniably reasonable, applying a governance feminist critical analysis these sorts of rights claims might instead be seen as simply legitimising the concentration of power in the hands of the most powerful groups.<sup>406</sup> Rights institutions have keenly absorbed liberal and radical feminist thinking and no matter what the unintended consequences of unconditional prohibition on certain groups of women, the human rights stance on polygamy remains unchanged. Caution might even be advised in the African rights context, where women from the region were heavily involved in defining the human rights approach to polygamy in the Maputo Protocol. Before too much is assumed about power and participation it is worth noting the basis for the Protocol was the suggestion of local NGOs and the African Commission, prompted by their concern for the lack of will on the part of governments to recognise and enforce women's rights. In this way, it bears some similarity to calls for action by international women's rights activists and feminists in the West in being prompted, managed and negotiated by establishment actors, even if this time at a regional level. In Africa, organised networks of feminists operate locally, many of who will have donor funding arrangements that set the tone for the feminist activism.<sup>407</sup> Such networks involve a web of relationships that use local resources to distribute global policies based on Western feminist ideological norms. In that connection, while local efforts to join the international

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406 Grewal (n 379) at 339 quoting Adetoun Ilumoka 'African women's economic, social and cultural rights – towards a relevant theory and practice in RJ Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994), describing the concept of rights in the African context, comparing the struggle for civil rights by elites using the vernacular of rights, and the struggle for social justice outside rights frameworks in mass movements.

407 Janet Halley and others (n 52).

movement to criminalise polygamy arguably represent an improvement on the simple imposition of global standards, it is possible to see how other local women, those with different priorities, may continue to remain unheard. Whether it is because they are less able to organise for economic, geographical or other reasons, or because they may not have known about the negotiations owing to a lack of available methods of communication, the unintended consequences of rejecting polygamy are likely to have had a greater impact on these women. For these reasons, while the Maputo Protocol gives the impression of being a document created by local women, for local women, given the constituency of those driving its implementation, it might also simply be another example of the lives of less dominant women being denied recognition in the rights context as ‘human’.<sup>408</sup>

The content of women’s rights has undoubtedly expanded greatly thanks to the work of Chinkin, Charlesworth and many others who have demanded women’s involvement and influence on the corpus of international law and rights so they are more likely to reflect women’s lives and needs. In spite of the positive progress made in relation to women’s rights, however, the human rights approach to polygamy remains problematic for some women. The dim view of polygamy taken by rights advocates is especially problematic in the refugee setting, where the impact of unconditional prohibition and the pressing need for recognition appear to have gone unnoticed. This is despite the fact that UNHCR guidelines confirm that gender has an impact on women’s experiences of displacement, and that women are much more likely to suffer when they are isolated and alone.<sup>409</sup> The ‘profound physical insecurity’ and a ‘distressing frequency’ of gender based violence such as rape, abduction, sexual abuse, demands for sexual favours in return for ‘protection’ or for basic needs like food or shelter

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408 The challenges for displaced women may also be further exacerbated by physical factors (such as pregnancy and breastfeeding) or cultural factors (such as being unable to seek employment outside of the home), all of which make women more prone to further, specific harm and exploitation. In addition, the Human Rights Committee has noted that “[W]omen are particularly vulnerable in terms of internal or international armed conflicts. States parties should inform the Committee of all measures taken during these situations to protect women from rape, abduction and other forms of gender based violence.” UN Human Rights Committee ‘General Comment 28’ Equality of rights between men and women (Article 3) UN Doc CCPR/C/21/rev 1/Add 10 (2000).

409 HRC General Comment 28 (n 408), paragraphs 30. “Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. States parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way and include information on the measures taken to counter these effects.”

are immaterial when it comes to excluding additional wives.<sup>410</sup> These women remain separated from their husbands and families and unable to avail themselves of domestic immigration law that excludes them solely on the basis of their marital status, and they remain largely invisible to the international community, too. When it comes to the scope and substance of rights protection, the lives of these women have little influence on the ideological aims of international human rights standards. In essence, by simply treating polygamy as a backward, non-European practice, the human rights movement does a dis-service to these women, a sentiment which has been expressed by one judge in the European human rights setting, where he warns against the “politico-ideological” discourse informing the majority view, suggesting plurality must be given more weight, and complaining specifically that legal analysis should not “... caricature polygamy ... by reducing it to “discrimination based on the gender of the parties concerned.”<sup>411</sup>

The lack of assistance provided by rights in aid of displaced women in polygamous marriages provokes the question: why? Malik outlines the techniques through which French governance feminists kept the voices of Muslim women on the periphery of the discussion on the veil, articulating the methods by which feminists in power were able to act as ‘proxies’ for all women and illustrating governance feminism at work in this context.<sup>412</sup> The techniques Malik outlines also resonate regarding the women’s rights approach to polygamy. While it is difficult to map specifically the governance feminist influence in the international human rights sphere, the historic adoption of traditional liberal and radical feminist approaches to rights is indisputable and the dominance of the liberal rights tradition in the development and implementation of human rights is clear. Despite the increasingly audible arguments demanding that feminists and women’s rights advocates consider race, culture and religion, international and regional human rights movements have largely been unwilling or unable to incorporate women like those in polygamous marriages into the category of ‘women’ who are protected by ‘universal’ human rights norms.

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410 Ninette Kelly, ‘Gender-Related Persecution: Assessing the Asylum Claims of Women’ (1993) 26 Corn Int LJ 625.

411 *Refah Partisi (The Welfare Party) and others v Turkey* (app number 41340/98) ECHR 13 February 2003, Judge Kolver, in a concurring but separate judgment where he seeks to distance himself from some of the more ‘unmodulated’ findings in the presiding judgment, especially regarding sensitive issues like religious values.

412 Malik (n 396).



Echoing in many ways the concerns of those who object to governance feminist influences, postcolonial feminists are also among those who add to the allegation that restrictive approaches to rights have failed to recognise many, less powerful women who remain on the margins because of a colonial past which continues to serve the needs of former dictators.<sup>413</sup> The tendency to essentialism in Western feminism is targeted by this discourse, which calls for more expansive aims than simply the elimination of sex discrimination, demanding an acknowledgement of the effect of gender, race and colonialism in the content of law and rights. Postcolonial feminists have in effect become transnational advocates of “feminism without borders”, problematising the ethnocentric universalism promoted by governance feminists and its impact on historically less powerful groups of women.<sup>414</sup> In doing so, they object to the continued dominance of knowledge production by those in the ‘developed world’ and the presentation of that knowledge as neutral, while others are consigned to the role of passive recipient of whatever apparently universal knowledge is handed down.<sup>415</sup> Concern over Western feminism being used as an irrefutable rhetoric that is blindly accepted and which becomes entrenched without question is summarised well by influential postcolonial feminist scholar, Inderpal Grewal:

*The hegemonic forms of Western feminism have been able, through universalizing discourses, to propose the notion of common agendas for all women globally, and to mobilize such discourses through the transnational culture of an international law that can serve the interests of all women globally. Human rights discourse emerges from such notions of law, relying on international treaties and instruments to set down universalized notions of what it means to be human and what rights accompany this humanity.*<sup>416</sup>

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413 Inderpal Grewal (n 379) 337.

414 Chandra Talpade Mohanty, *Feminism without Borders: Decolonising Theory, Practicing Solidarity* (Duke University Press, 2003).

415 Mohanty (n 414) introduces this idea at 48, in her discussion of the predominant representations of Third World women in knowledge production and its impact.

416 Grewal (n 379) 340. Mohanty (n 414) at 17 ‘Under Western Eyes’ expresses her concern at the same sort of irrefutable rhetoric.

The strategic definition of a universal women that Grewal highlights—an already constituted group, all with the same needs irrespective of their lived experience—implicitly creates an image of others who surely must be ignorant and victimised (or just bad) not to share the dominant feminist view. Such women sit in stark contrast to Western women who are educated and who have choice that they exercise freely for the good of all women-kind. The ‘other’ women are not only ignored, but derided, privileging the dominant group ever more, so that the views of Western, white, liberal feminists become—indisputably—the ‘norm’.<sup>417</sup>

Turning again to Cyra Choudhury, she too laments the circular arguments that justify the rise of Western liberal aims, so that they have effectively become their own justification for continued imperialism by the West. For Choudhury, liberal feminism acts to promote a narrative of non-liberal societies (very often also former colonies and countries in the ‘third world’) as ‘developing’ and their women as ‘victims’, a description which resonates in the context of Muslim wives who are often assumed in the West to lack agency in choosing a plural marriage.<sup>418</sup> In her strong critique of traditional feminist approaches to Islam, Choudhury suggests that what dominates Western feminism is a very specific idea of what it means for women to flourish. The force of this guiding principle makes it inconceivable to view Muslim women as anything other than directly or indirectly compelled to enter into practices that are considered inherently patriarchal and oppressive, like polygamy. The end result is to promote a way of thinking that militates for a particular version of progress, pushing ‘other’ women towards the sort of values that are privileged in a liberal society, so that they may advance beyond their deviant history.<sup>419</sup> Specifically with regard to polygamy and the postcolonial view on its regulation, Choudhury considers the prohibition on polygamy as an

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417 Mohanty (n 414) 22.

418 Cyra Choudhury, ‘Empowerment or Estrangement?: Liberal Feminism’s Visions of the “Progress” of Muslim Women’ (2009) 39(2) University of Baltimore Law Reform 153, 155.

419 Choudhury (n 418) 157, refers to ‘deviant history’ quoting Uday Singh Mehta in *Liberalism and Empire* at 77 in a nod to early liberalist influences in colonial interventions, that which is unfamiliar is automatically assumed to be undeveloped. Mohanty, in Mohanty and others (eds) *Third World Women and the Politics of Feminism* (Indiana University Press, 1991), also builds on this theme, pointing specifically to the habit of Western elites in automatically assuming that women from other cultural settings lead lives which are dominated by oppressive cultural practices, causing them to label other women as: “politically immature [and a category of women] who need to be versed and schooled in the ethos of Western feminism.” [pinpoint]

imperial act.<sup>420</sup> In so doing, she refers directly to descriptions of polygamy as ‘barbaric’ and the self appointed role of the Court in *Reynolds* as a ‘civilising force’, expressing the firm view that decisions like *Reynolds* illustrate the manifestation of postcolonial oppression in the context of plural marriage.<sup>421</sup>

Susan Moller Okin espouses precisely the cultural imperialist view postcolonial scholars so deride in her inflammatory essay on multiculturalism and its impact on women.<sup>422</sup> Writing at a time when cultural relativism was a more prominent intellectual hook on which to hang a critical, liberal hat, Moller Okin pulls no punches when she says:

*In the case of a more patriarchal minority culture in the context of a less patriarchal majority culture no argument can be made on the basis of self-respect of freedom that the female members of the culture have a clear interest in its preservation. Indeed, they might be much better off if the culture into which they were born were either to become extinct ... or preferably to be encouraged to alter itself to as to reinforce the equality of women ...*<sup>423</sup>

The ease with which Moller Okin apparently argues for the extinction of an entire offending culture—that is any culture that does not have the essential qualities which signify sufficient ‘progress’—is not only astonishing, but from a postcolonial vantage point, also indicative of the on-going legacy of the colonial enterprise. In that regard, Moller Okin’s necessity for assimilation is all encompassing, not to mention, very often convincing in the West, as a justification to outlaw heretical cultural practices, a fact that is all the more chilling at the time

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420 Choudhury (n 175) 989 referring to the regulation of polygamy in the United States of America as an ‘imperial act’ quoting Nathan Oman in ‘Oman, Nathan ‘Natural Law and the Rhetoric of Empire: *Reynolds v United States*, Polygamy and Imperialism’ (2011).88 Wash U L Rev 661.

421 Choudhury (n 175) makes reference to the fear of Mormons politically and economically by other religious groups in the USA and this being a reason for the condemnation of polygamy. In effect, the justification in using law is to civilise those who are considered too backward to help themselves.

422 Susan Moller Okin, in Cohen, and others (n 116).

423 Choudhury (n 418) 158 quoting Susan Moller Okin (n 116).

of writing with the renegade actions of a new President Trump.<sup>424</sup> Keeping firmly to the view that other cultural practices such as veil-wearing, or for that matter, polygamy, are easily identifiable outward signs of women's subordination, critics like Moller Okin leave no door open to the possibility that such practices might be linked to religious devotion, which she regards as generally hostile to women, or be a simple matter of choice.

Postcolonial feminist discourse assists not only in articulating the problem with mainstream approaches like that of Moller Okin to non-Western practices like polygamy. It also provides a theoretical pathway towards an alternative conclusion about the lives of women in polygamous marriage by allowing for experiences of polygamous wives to result from factors other than assumed oppression and subordination. By applying a postcolonial approach to a practice dismissed as inherently unequal, it is possible to see the influence of privilege on the content of law and the response to polygamous marriage. The benefit of this is that response might more honestly be questioned, all the more so in the refugee context where the reliance on harm as a justification for banning polygamous wives seems not only weak, but also hypocritical.

#### **4.4 The Failure of Rights**

The lack of compliance with human rights by states, complaints about the substance of human rights guarantees, the want of impact in critical cases—all of these things and more have given cause for great concern over the efficacy of human rights since the introduction of the Universal Declaration in 1948.<sup>425</sup> In the context of this work, the reality is that human rights fail refugee women seeking polygamous family reunion. It is not just the broad categories of refugee rights and women's rights outlined so far which let down displaced polygamous wives. Other, more directly applicable rights neglect their needs, too. As already discussed, the clear

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<sup>424</sup> President Trump's rhetoric and policies are well publicised. Among the policies he has attempted to bring into law is the ban on travel to the United States of America by citizens from six Muslim majority countries, a move that was blocked following legal action to challenge his Executive Order 13769 'Protecting the Nation from Foreign Terrorist Entry into the United States.'

<sup>425</sup> Eric Posner, *The Twilight of Human Rights Law* (OUP, 2014) 148 where Posner describes human rights treaties not so much as idealistic, but an act of hubris which have done little good for those who need them.

commitment to equality and the simplicity of the idea that everyone should be free from discrimination, for example, is measured on the basis of values which are assumed inherently to be good, as well as assumptions about a practice which is so often caricatured in mainstream discourse and reduced according to human rights standards as something which is inherently bad.<sup>426</sup> These women find no relief in their right to equal treatment or their right not to be discriminated against, directly or indirectly. On the contrary; as explained earlier in this chapter, while polygamous marriage is not explicitly prohibited in any international or regional human rights instrument, the inherent gender imbalance in polygamy is elevated to as to trump any other violation of the right to equality for women in plural marriages.

In addition, so far as marriage is concerned, the United Kingdom and other states that restrict entry for non-nationals according to marital status do so entirely in accordance with human rights as they stand today. States have no obligation to settle polygamously married husbands and wives, and the restriction on additional spouses coming to the United Kingdom under the Immigration Act and Rules is not vulnerable to any claim based on the human right to marry.<sup>427</sup> States' ability to restrict polygamously married couples from being reunited is unfettered and the impact on anyone affected appears immaterial. Women—and it is almost always women who are those most detrimentally affected by this restriction in immigration—are not assisted

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426 The 'clear commitment' to the principle of equality that is questioned here has long been fundamental to the content and purpose of human rights and has been widely embraced by the community of human rights advocates as a cornerstone of rights protection. Once the UN Charter was adopted, non-discrimination became a recognised principle of international human rights law. Articles 1(3), 13(1), 55(c), and 56. The UDHR followed, which states in Article 1 that all human beings are born free and equal in dignity and rights. Under Article 2, everyone is entitled to all the rights and freedoms in the UDHR without distinction of any kind (race, colour, sex, language, religion, political or other opinion all mentioned expressly). According to the International Bill of Rights and Article 26 ICCPR "All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The ICESCR also has similar provisions in Article 2(3) and Article 3. Specific characteristics, such as race and gender, have even been given their own human rights treaty voice in the form of conventions devoted entirely to eliminating discrimination on those grounds, including CEDAW, of course, which is outlined earlier. See also the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD). For a discussion of equality and polygamy in the American context of the Free Exercise Clause of the First Amendment and Due Process arguments, arguing that polygamists would do well to abandon arguments based on religion and instead rely on substantive Due Process arguments like the protected liberty interest of 'equal dignity', see Faucon (n 188).

427 The right to marry appears in UDHR, Article 16; ICCPR Article 23; ESCR Article 10 (which requires free consent of the parties), ECHR Article 12.

by refugee rights, women's rights or the notion of equality—and neither are they assisted by the more specific right to marry.<sup>428</sup>

Similarly, the right to a family life offers polygamous families no relief. In *Bibi*, the interference with the Article 8 right was justified in accordance with the law and necessary to pursue a legitimate aim.<sup>429</sup> Even allowing for the established principle of state sovereignty and the long-standing reasonableness of border control, the outcome of this case in justifying the continued exclusion of polygamous wives does not sit comfortably with related considerations, like the importance of the right to a family life, the supposed universality of its application and the acknowledgement of polygamy for domestic family law matters. Despite this, additional plural wives find no relief in the right to a family life.<sup>430</sup>

Lastly, the freedom of thought, conscience and religion has been described by the European Court as a vital component of the regional set of human rights protections, and one which is inextricably linked with the pluralism essential to a democratic society. Its ambit does not, however, extend to protecting every act motivated or influenced by religious belief.<sup>431</sup> In that regard, the European Convention does not provide Muslim families with the unconditional freedom to manifest their religion in the form of polygamous marriage in prohibitive states like the United Kingdom. Particularly controversial in this regard have been the veil wearing

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428 Rachel Young and Stewart Leech 'Marriage, Divorce and Ancillary Relief under the Human Rights Act 1998: An Introduction' (2001) 3 European Human Rights Law Review 300 summarises the position regarding the right to marry and polygamous marriage in the United Kingdom, both in immigration and more generally, citing *Bibi* for immigration purposes, and *Khan v United Kingdom* (App No 11579/85) ECHR 1986 in the domestic legal sphere, where neither the right to marry nor the right to manifest one's religion entitled a man have intercourse with a girl under 16, irrespective of any religious marriage which took place. For an analysis of the right to marry in the American context see Cass R Sunstein, 'The Right to Marry' (2005) 26(5) Cardozo Law Review 2081, where the author discusses the content and scope of the right to marry, including the basis for limitations on the scope of the right, referring to marriage as a simple government operated licensing system but one in which also involves "aggressive government intervention" in limiting the opportunity for some groups to marry (an intervention the author welcomes regarding same-sex and plural marriage).

429 *Bibi* (n 192). The Court deemed the aim of the domestic law to be the preservation of the Christian, monogamous culture which is dominant in the United Kingdom, a legitimate aim for the state which the United Kingdom had exercised in a proportionate manner. In that regard, the decision in *Bibi* arguably provides evidence to support the claim that excluding polygamy has more to do with the imperialist agenda of the state in maintaining Christian, Western and white values than the prevention of any sort of harm that might be caused to women in plural marriage.

430 *Kokkinakis v Greece* (App No 14307/88) EHRR 397.

431 *Refah Partisi (The Welfare Party) and others v Turkey* (app number 41340/98) ECHR 13 February 2003.

cases, already discussed, where a balancing exercise is carried out regarding the protection of religious freedom and the state's sovereign right to limit the exercise of such freedom according to its own public policy concerns.<sup>432</sup> The right to religious freedom is also particularly unlikely to be of assistance in immigration matters, where the state is often afforded an even broader margin of appreciation.<sup>433</sup>

The failure of rights claims to offer any assistance to displaced wives in challenging their exclusion is explained here, not as a perfectly ordinary reading of the law and its boundaries, but an outcome which results from the striking failure of rights from two perspectives; that of universality and of culture.<sup>434</sup>

#### 4.4.1 How Rights Fail: Universality

While the modern system of international human rights protection begins with the claim in the UDHR regarding the “inherent dignity” and the “equal and inalienable rights of all members of the human family” those on the periphery of power have little say in how these aims are defined. For all the concern Moller Okin and others who share her views express not to let abhorrent cultural traditions and practices dilute rights, the truth is that rights are already culturally relative as a belief system requiring a moral and historical certainty that stems solely from a morality which originates in the West. As Mutua explains:

*... human rights, and the relentless campaign to universalise them, present a historical continuum in an unbroken chain of Western conceptual and cultural*

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<sup>432</sup> The balancing act carried out by the Court in weighing up states' restrictions on religious manifestation is discussed in Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (OUP, 2009), 86 where the idea that the state is capable at all of neutrality in such situations is questioned. See also Rex Ahdar (ed) *Sharia Law in the West* (OUP, 2010), 89 which addresses the topography of Shari'a in the Western political landscape and how Muslims in non-Muslim states like the United Kingdom, and Robin Griffith-Jones, *Islam and English Law: Rights, Responsibilities and the Place of Shari'a* (CUP, 2013) and Ronan McRae, *Religion and the Public Order of the European Union* (OUP, 2010). Also, Dominic McGoldrick, 'Accommodating Muslims in Europe: from Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws' (2009) 4 Human Rights Law Review 603.

<sup>433</sup> Jacobs, White and Ovey (eds) *The European Convention on Human Rights* (5th Edition OUP, 2010).

<sup>434</sup> Elizabeth Schnieder, 'Dialectic of Rights and Politics: Perspectives from the Women's Movement' (1986) 61 NYU L Rev 589, regarding the failure of rights generally to effect change on their own.

*dominance ... at the heart of this continuum is a seemingly incurable virus: the impulse to universalise Eurocentric norms and values by repudiating, demonising, and “othering” that which is different and non-European.*<sup>435</sup>

Nowhere is the fiction of universality for those on the periphery of rights more starkly illustrated than in the case of refugees, a group for whom human rights are both critical and, very often, completely absent. By definition, refugees are no longer afforded the protection of their own state and look to other states for refuge as a result. It is commonly the case that they will have limited rights in the receiving state, and particularly of late, their economic and social impact may be feared by the local community. In this regard, refugees test the very idea of universal rights precisely because they are denied the same rights as citizens from the outset. The experience of refugees, stuck in a human rights ‘no man’s land’, may be prolonged and difficult. It highlights the importance of community membership to making a successful rights claim—a requirement that is hardly consistent with the notion of universality, exemplifying the idea of rights as:

*...what historically subjugated people's most need, [and also] ... one of the cruellest social objects of desire, dangled above those who lack them.*<sup>436</sup>

In this sense, the experience of refugees shows that humanity is not always well represented by rights. In fact, human beings are classified when it comes to human rights protection, not according to need, but status. Here, the writing of Costas Douzinas is helpful in highlighting the impact of systemic pressures like capitalism and nationalism in certain groups being exempted from the “protective umbrella” of rights guarantees.<sup>437</sup> According to Douzinas, the potential for good arising out of human rights is impoverished by social, economic and political structures, which limit their content and their utility, making them the “late capitalism

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435 Makau Mutua, (n 40) ‘Savages, Victims and Saviours’ at 210. For an additional exposition on the essentially ‘liberal’ quality of apparently ‘universal’ rights, see also Chris Brown, ‘Universal Human Rights: A Critique’ (1997) 1 *The International Journal of Human Rights* 41, where the author argues that rights are a symptom of a liberal society and not a cause and for that reason, they are difficult to promote without de-legitimising other forms of society.

436 Douzinas (n 37) 371, quoting Wendy Brown.

437 Douzinas: ‘The Poverty of (Rights) Jurisprudence’ in Gearty and Douzinas (eds) *The Cambridge Companion to Human Rights Law* (CUP, 2012), 68.



ideology of the middle classes.”<sup>438</sup> In line with this reasoning, the limited practical effect of rights is noted, and it is suggested that they must respond to the interests of those who are less dominant to avoid being considered a meaningless, if prevailing, ideology; something owned and defined by powerful, neo-liberal groups. Otherwise, it becomes self evident that human rights do not belong to all humans, rather: “[human rights]...construct humans on a spectrum between full humanity, lesser humanity and the inhuman.”<sup>439</sup> Where claims to universality and difference clash, it is the ‘other’ who must accede to the “civilising pedagogy [of the] universality represented in European values, and to confess the particularity of their own.”<sup>440</sup>

This lack of credibility in the claim of universality is laid bare in the experiences of the “underclass” of immigrants, refugees and undesirables whose experience requires us to be interested not only in the discourse of human rights but its efficacy in practice.<sup>441</sup> The needs of these people are not reflected in approaches to family reunification precisely because they are politically and economically weaker than most others. Instead, they are subject to “reactionary” nationalist voices, by those in power and in the media, where alarm is frequently expressed at the threat they pose, and they are most often described in pejorative terms.<sup>442</sup> This crisis of universalism, and its illustration in the refugee experience of rights, illustrates the critical need for change. To that end, one commentator has suggested all that is needed is an inclusive and respectful dialogue to achieve genuine understanding that is motivated by a commitment to the equal freedom and dignity of all.<sup>443</sup> An admirable aim—and one that is also perhaps hopelessly optimistic. It reflects the core of the crisis of universality, however, in calling for the more broad inclusion and involvement of the ‘other’ in the rights movement for the sake of rights beneficiaries and the credibility and efficacy of rights themselves.

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438 Douzinas (n 437) 68.

439 Douzinas (n 437) 68.

440 Sundhya Pahuja ‘Black Skin, White Masks? Training African Leaders in the Art of Universality (Blog post) (19 May 2017) <<http://criticallegalthinking.com/2017/05/19/black-skin-white-masks-training-african-leaders-art-universality/>> accessed 20 May 2017.

441 Douzinas (n 437) 57

442 Douzinas’ concern is arguably reflected starkly in the dehumanising language used by David Cameron, in referring to a ‘swarm’ of refugees during a television interview in 2015 and in seeking to justify the use of that language, subsequently referred to his work to prevent refugees ‘breaking in’ to the United Kingdom (see report at n 10).

443 Jack Donnelly, ‘Cultural Relativism and Universal Human Rights’ (1984) 6(4) Human Rights Quarterly 300.

#### 4.4.2 Why Rights Fail: Culture

In addition to the failure of universality, as this chapter has also sought to show, a related but separate problem is that rights do not reflect the values or beliefs of less dominant cultures. While the critique of universality might be described as one which is occupied with *what* the problem is, this critique has been concerned with understanding some of the reasons *why* rights fail certain groups, focussing on the hierarchical ordering of rights standards, which gives priority to the demands of historically dominant communities over less dominant groups.<sup>444</sup>

Moreover, when less dominant groups demand a re-ordering of the rights hierarchy, they are defined as ‘culturally relativist’, a pejorative term for an unwanted departure from apparently neutral universalism. In an attempt to reconcile the potential for conflict between relativist and universalist approaches to human rights, a continuum of relativist approaches has been offered by one commentator, to assist in deciding on a range of permissible cultural variations.<sup>445</sup> According to this categorisation, those practices that are less offensive on the cultural relativism scale might then be permitted and cultural deviations from human rights allowed.

Such an attempt at reconciliation between the relativist and the universal is admirable, but inherently flawed. Rather than truly standing in the shoes of less dominant groups in considering rights, offering concessions of this type serve only to perpetuate the usual hierarchy because they originate from a position which is remarkably similar to that displayed by old imperial masters. What is offered is not equal partnership in responding to the conflicts between rights and culture but rather ‘tolerance’, with all of the power, pre-eminence and control that it implies. For all the accommodation of less powerful groups this proposes, this

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<sup>444</sup> Jack Donnelly (n 444).

<sup>445</sup> Jack Donnelly (n 444). On the role of cultural relativism and rights, see also Abdullahi An Na’im, ‘Religious Minorities under Islamic law and the limits of cultural relativism’ [1987] *Human Rights Quarterly* 1- 18; Cyra Choudhury, ‘Beyond Culture: Human Rights Universalisms Versus Religious and Cultural Relativism in the Activism for Gender Justice’ (2015) 30 *Berkley J Gender L & Just* 226 and Frances Raday, ‘Culture, Religion and Gender’ (2003) 1 *International Journal of Constitutional Law* 663.

sort of tolerance continues to operate from an assumed moral high ground, and does not equate to a “dialogue of equals.”<sup>446</sup> Far from being helpful, this is a type of human rights name-calling, which serves only to reinforce the stigmatisation of anyone who does not conform to a Western conception of human rights.<sup>447</sup>

The failure of culture is perhaps no-where more visible than in conversations about the human rights of women, having become what one commentator has called the “go-to explanation” for all kinds of beliefs and practices which have an impact on women’s lives, as well a default justification for intervention.<sup>448</sup> In that regard, criticism of the work of Moller Okin once again resonates, highlighting the possibility for harm arising out of dominant human rights feminists’ complicity in using culture to subordinate other women, whatever the outcome for their ‘illiberal’ culture, in a destructive display of “civilisational superiority”.<sup>449</sup> Such interactions, according to critical feminists, are anchored in colonial approaches to non-white, non-Western, non-dominant communities. At worst, this is racist. At best, it is unproductive and destructive for feminist activism and collaboration, reducing its emancipatory potential for all women.<sup>450</sup>

Preferable, then, to the adversarial ‘relativist versus universalist’ approach to difference and human rights is an approach to rights which doesn’t just *take account* of the ‘other’ but which *involves* all parties as equal partners from the outset in both the formation and the implementation of rights, an approach which is epitomised in postcolonial and TWAIL critiques. In combating the homogeneity required for human rights to be effective and to rid rights of their association with historical oppression, the postcolonial critical method of

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446 BS Chimni ‘Legitimizing the International Rule of Law’ in James Crawford and Marti Koskeniemi (eds) *The Cambridge Companion to International Law* (CUP, 2012) 290 at 306, discussing Gramsci “Selection from Prison Notebooks” London, Lawrence & Wishart, 1971). Knop and others ‘From Multiculturalism to Technique: Feminism, Culture and the Conflict of Laws Style’ (2012) 64 *Stanford Law Review*, 589 654. The authors suggest a more nuanced approach to cultural difference in their article, by using a conflicts of law approach. While this approach is not adopted, their aim to ‘slice’ the problem into component parts is considered relevant to the postmodern feminist approach this work suggests.

447 Makau Mutua, ‘The Ideology of Human Rights’ (n 40) 598.

448 Cyra Choudhury (n 445) 230. Choudhury confirms her view that the term culture has included religion and ethnicity to become an umbrella term where it is convenient.

449 Cyra Choudhury (n 445) 231.

450 Cyra Choudhury (n 445) 231.

redefining rights encourages involvement, and seeks to avoid the burden of a new imperialism in the form of international human rights standards, imposed from on high. Instead of providing a more modern platform for a very old type of prejudice, as recommended by one international law scholar, to be legitimate international human rights law must:

*... purge itself of hegemonic modes of thinking and accompanying practices. The legitimacy of an international rule of law is a function of its journey towards becoming a more plural construct, taking cognisance of cognate narratives in other cultures and civilisations.*<sup>451</sup>

Advocates of this view object to human rights as ‘moral imperialism’, buttressed by a pre-occupation with false universality.<sup>452</sup> Third world voices increasingly seek to expose the imperialist reality of rights and to deconstruct the rights project so that their voices are heard and their experiences inform the content of rights standards.<sup>453</sup> The aim and purpose of postcolonial and TWAIL approaches to rights is summed up by one of the founding members of the TWAIL movement, Makau Mutua, in the following paragraph, which highlights the arrogance of the West in assuming sole responsibility for the meaning of rights:

*What is interesting are the parallels between [superior] Christianity’s violent conquest of Africa and the modern human rights crusade. The same methods are at work and similar dispossessions are taking place, without dialogue and conversation. The official human corpus, which issues from European predicates, seeks to supplant all other traditions, while rejecting them. It claims to be the only genius of the good society.*<sup>454</sup>

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451 BS Chimni (n 446) 307.

452 For introductions to TWAIL, see the references at n 40.

453 Marie Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (CUP, 2006) 82 points to Edward Said and the concept of ‘Orientalism’ and discusses the movement, the commitment to “expose, deconstruct, counter and (in some claims) to transcend the cultural and broader ideological legacies and presences of imperialism.”

454 Marie Dembour (n 453) 82, quoting Mutua, *Human Rights: a Political and Cultural Critique* (University of Pennsylvania Press, 2002).

Drawing a parallel between the dispossession caused by colonisation and human rights, Mutua expresses clear dissatisfaction with the impact of the rights project. Its exclusionary discourse, which bars the ‘other’—those who are often already dispossessed—from involvement in the human rights discussion, is evidence of an on-going effort by the West to ‘civilise the uncivilised.’<sup>455</sup>

Another significant participant in the third world critiques of international human rights law, Antony Anghie, shares this view, describing international legal standards as a tool to legitimise conquest and dispossession. According to Anghie, human rights have been based from the outset on exclusions and discriminations. He insists that the non-European world must no longer be considered peripheral for human rights to have purpose. To consider those in the global south outside the core of human rights creation instantly confirms their status as inferior, as subordinates. More than that, doing so is a political act, under the cover of the claim of universal morality, and it allows the West to operate from an apparently never-endingly righteous position.<sup>456</sup> Postcolonial critics like Anghie point to the deception behind this exclusion of the other as the “mythical elevation of the human rights corpus beyond politics and political ideology” where deeply embedded political norms that are both European and liberal are apparently universalised by the human rights movement.

Prompted by the criticism of commentators like Mutua and Anghie, a new human rights activism has emerged, which seeks to move beyond the binary relativist/universalist discourse. Those who are active in this new discourse elevate the relationship between history and power, and note the importance of that relationship in the human rights context. In a departure from the old rhetoric on culture and universality, the problem of long-standing inconsistencies in power distribution is privileged to question the legitimacy of rights, as well as point out the detrimental effect on less powerful groups. These critics of imperialist approaches to rights are insisting on a new definition of international human rights law which brings its historical foundations to the fore and which no longer demonises those outside the privileged inner circle. Precisely how the interests of this new activism might be met is less clear, although the

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455 Antony Anghie ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law’ (1999) 40 *Harvard International Law Journal* 1.

456 Makau Mutua, ‘The Ideology of Human Rights’ (n 40) 598.

vision statement issued at the inaugural conference to promote third world approaches to international law makes some tangible recommendations.<sup>457</sup> These include contesting the privileging of Western voices by providing tangible and imaginative opportunities for third world participation; formulating and disseminating a substantive critique which recognises that mainstream approaches to international law have fostered the reproduction of structures which marginalise and continue to dominate the global south and highlighting the relationships of power which constitute and which are constituted by the current world order.<sup>458</sup> TWAIL approaches to international human rights law relate the modern domination of third world peoples by the content and efficacy of human rights to their historic domination more generally. Acknowledging history, such approaches seek to intervene and change the traditional dynamic of power as it informs the content of rights. In its critique of rights, this work has attempted to do each of these things, by privileging empirical accounts of polygamy and highlighting the role of history and power in the human rights narrative, so that rights can be seen for what they so often are: the property of the dominant culture, inextricably associated with imperialist roots.<sup>459</sup> In the context of those women who are the focus for this research, postcolonial, TWAIL and anti-imperialist critiques help to ensure that “human rights hawk feminists” are not allowed to perpetuate the violence of colonial intervention by imposing a seemingly benign, but ultimately harmful, liberal rights “imperative to progress” which prevents rights from being truly universal.<sup>460</sup>

## 4.5 The Future of Rights

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457 ('TWAIL') James Gathii (n40).

458 James Gathii (n40) 26. It is worth noting the 'TWAIL nihilism' critique, which suggests TWAIL offers no positive agenda for reform because it turns away from modern international law structures and offers nothing in its place, even in a crisis so that according to TWAIL international institutions are worthless and helpless. But the idea is that TWAIL asks international law to be considered, developed and applied from the standpoint of the experiences of less dominant citizens in the third world – therefore, where seeking assistance of international institutions assists those peoples, using a TWAIL approach doesn't prevent that. Gathii cites Jose Alvarez as the primary critic, but says the criticism of nihilism is not restricted to him either (Jose Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 881 (2003).) According to Gathii, just because TWAIL is critical, this is not the same as it being nihilistic. TWAIL critiques are made with a view to (in his words) “transform the egalitarian aspects of international law...” not simply to deride it.

459 Upendra Baxi, *The Future of Human Rights* (2nd edn, OUP2006).

460 Choudhury (n 418) 155.

This rather gloomy analysis of rights failures provides a basis for wondering whether or not there is cause for hope regarding the future of rights, or as Boaventura de Sousa Santos puts it:

*... whether the vocabulary or the script of human rights is so crowded with hegemonic meanings as to exclude the possibility of counter-hegemonic meanings.*<sup>461</sup>

The crucial question is then, might human rights be redeemed, or should we abandon the rights project altogether for its failures? A predictable first response to that question, given also the ease with which one might cite a range of catastrophic human rights failures since the UDHR, might be to say that there is no hope for rights and that they are unable to live up to their promise of universal protection.<sup>462</sup> Another, more measured, approach might be to argue that rights are imperfect and contradictory and that on some occasions they are worth pursuing, while at other times, we must simply accept they are not.<sup>463</sup> Taking this line of argument it becomes reasonable, in contemplating the future of rights, to acknowledge their failures, point to their value and to make suggestions for their improvement.

The merit of upholding rights is clear. The promise of international human rights is that each human being exists with equal dignity, not contingent on their social group or physical location. Every one of us is the subject of global concern in the form of international human rights standards. To that end, rights remain capable of providing a common language for all human beings to advance their cause, and for governments to know the extent of their responsibility, to citizens and non-citizens alike. In this way, international rights act as a global moral compass, guaranteeing that the dignity of all human beings is honoured and respected. Even if there may often be a lingering discomfort with what rights are and how to implement them fairly, for many, rights are still a helpful—perhaps the only—yard-stick with which to measure the behaviour of states. Effectively, this approach requires contemplating a life

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<sup>461</sup> De Sousa Santos (n 343) 280.

<sup>462</sup> Wendy Brown, 'The Most We Can Hope For Human Rights and the Politics of Fatalism' (2004) 104 *South Atlantic Quarterly* 451, Posner (n 425), Brown (n 435).

<sup>463</sup> Dembour (n 453) refers to this choice as the a choice between the practical critique (that rights can and must be improved) and the conceptual critique (that the concept of rights is ultimately hopeless).

without international human rights standards, where states may behave with impunity in a dangerous vacuum; an outcome that is likely to be unappealing. For that reason, rather than abandon rights, it is better to work strenuously to hold them to account.

In favouring an optimistic and inclusive response to the failure of rights, this work places faith in the idea that those who are subjugated still have something to gain from rights, despite their many imperfections. While challenges undoubtedly remain, as those who also criticise and support rights have already said, there is still much potential in the rights project.<sup>464</sup> Moreover, for those women who are the focus for this work, the transnational context of legal restrictions on women and refugees necessitates the involvement of international human rights guarantees where those restrictions are called into question. How else might European and other states, including the United Kingdom, be convinced to reconsider their domestic laws on family reunification? Rather than abandon rights altogether, it is surely more sensible instead to abandon the idea that rights are a-historical, a-cultural and a-contextual.<sup>465</sup> Knowing that there is no shame in a contested rights discourse, it is better to “tinker with the machine we have created” to give human rights the opportunity to achieve more than simply entrench the status quo.<sup>466</sup>

This approach requires innovation, something which may not be natural for the human rights project, in all its vast and slow moving glory. That said, human rights are clearly not completely closed to change, having already evolved to include new groups not at first envisaged by early rights treaties.<sup>467</sup> It is undoubtedly possible to envisage a conception of rights that is not

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464 Patricia Williams, *The Alchemy of Race and Rights* (HUP, 1992).

465 Paul Patton, ‘History, Normativity and Rights’ Douzinas, Costas and Gearty, Connor, *The Meaning of Rights* (CUP, 2014) 233, 234, where Patton asks precisely this question.

466 Connor Gearty ‘Human Rights: the Necessary Quest for Foundations’ in Douzinas and Gearty (n 465) 36, where Gearty says it is right always to be prepared to tinker with the machine we have created because ethics is a subject which never comes to an end.”

467 For example, rights regarding sexual orientation, or LGBTQ rights. In one sense, such rights are not new to the ordinary lexicon of rights claims, but those who assert them do represent new ways of re-imagining rights. Well established rights, like the right to life, the right to a family life, privacy, free expression and movement, even education—are required to include this new context and experience. Protecting the human rights of people who are transgender (or persons who have a gender identity which is different to the gender assigned to them at birth and who feel they must present themselves differently as a result, including, among others, inter-sex, transsexuals, transvestites and cross-dressers) is perhaps the most recent manifestation of the evolution and expansion of human



evangelically attached to the current collection of standards, allowing a refreshed approach to the interpretation and implementation of rights and at the same time demanding involvement by diverse groups to determine the content of rights standards from the outset. It is certainly worth trying. In the words of one advocate for change:

*... the long term interests of the human rights movement are not likely to be served by the pious and righteous advocacy of human rights norms, frozen and fixed principles whose content and cultural relevance is questionable.*<sup>468</sup>

In considering the future of rights, then, perhaps the most important factor is the extent to which they contribute meaningfully to the protection of those who need them, or at least, that they promise eventually to do so.<sup>469</sup> Even this test does not require that rights must always triumph, however. Where they are not perfect, it is unfair to suggest that rights serve no useful purpose at all. Where they fail, instead of abandoning rights, it is still more productive to examine how they might best be put to use for those most in need. As Conor Gearty suggests in his work considering the very survival of rights themselves, by abandoning rights altogether, it is naturally inevitable that rights will continue to fail those who most need them.<sup>470</sup> In that connection, although the criticism outlined here poses a challenge of sorts to the rights movement, this challenge has the potential to make rights standards stronger, rather than guarantee their downfall. There is benefit in questioning the apparently inherent authority of rights and viewing the modern system of protection as an evolving project whose value is undiminished by discussion and change.<sup>471</sup> Allowing for the possibility of dispute over rights ought not to be an embarrassment to the rights movement. Rather, it offers the prospect of self-reflection and great improvement.

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rights standards in this way, although states continue to have a wide range of approaches to legal gender recognition. See *Goodwin v. the United Kingdom* (App no 28957/95) 11 July 2001 and *I. v. the United Kingdom* (App No 25680/94) 11 July 2002.

468 *Mutua* (n 40) 654.

469 Douglass Cassel, 'Does International Human Rights Law Make a Difference?' 2 *Chi J Int La*. 121 (2001).

470 Conor Gearty, *Can Human Rights Survive?* (CUP, 2006).

471 Gearty (n 470) 35, quotes Stephen Sedley, Holdsworth Lecture November 2005 – 'Are Human Rights Universal, and Does It Matter?' and Amartya Sen 'Elements of a Theory of Human Rights' 32 *Philosophy and Public Affairs* (2004) 315 "The admissibility of a domain of continued dispute is no embarrassment to a theory of human rights."

Proceeding with rights, the question becomes, which narrative regarding the foundation and authority for human rights ought we to believe, and why? The reality is that, if we allow the possibility of a conversation on norm creation and the nature and scope of rights, it is likely to continue indefinitely so that no particular foundational argument ever ‘wins’ or dominates others *ad infinitum*. This on-going debate is constructive, allowing human rights continuously to be put to the test and amended by ‘norm entrepreneurs’ where rights are found lacking.<sup>472</sup> This way, rights are much more likely to benefit those in need of protection, as well as benefit the foundation for rights in the long run. Central to this suggestion, however, is involvement. That is, the participation of less dominant groups in the discussion on human rights, so that they have an equal voice in defining rights content (until perhaps they become the dominant, the powerful and the corrupt, themselves and a new ‘other’ demands a seat at the table). Without that participation, no meaningful challenge to the authority assumed by rights can occur. Human rights remain “vocal ejaculations” and “propagandistic manipulations” which disguise the power asymmetries quietly at work, which have long influenced their shape.<sup>473</sup>

If rights are to be defended, however, it is still essential to consider the ontological commitment that requires. If the aim of this work is to disrupt the ordinary basis for rights, how would a re-imagined approach to human dignity and universality look in reality? What is it that would make that renewed approach work, both conceptually and in practice? In effect, this work has asked the reader to consider rights as liberal values that are covered in a legitimising cloak of universalism. It has sought to undermine liberal self-confidence in the human rights project by exposing as peremptory the influence of those who exert the greatest institutional power over the content of rights, albeit that power is exerted in an apparently mild and flexible way.<sup>474</sup> This power, whether in state, NGO or inter-governmental form,

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472 Lisa S Alfredson uses this terminology in her text *Creating Human Rights: How Non Citizens Made Sex Persecution Matter to the World* (University of Pennsylvania Press, 2009), which discusses the role of “... persecuted, disenfranchised, homeless females, among the most powerless of the powerless in any context...” who successfully illuminated culturally relativist and sexist assumptions underlying the human rights norms informing refugee policy, triggering not only a radical shift in refugee policy in Canada, but also worldwide, to include sex persecution in refugee matters.

473 Costas Douzinas ‘The Poverty of Rights Jurisprudence’, Conor Gearty and Costas Douzinas, *The Cambridge Companion to Human Rights Law* Douzinas (n 437) 59, 60 quoting rights philosophers Alan Gewirth and James Griffin, that without sound reasons for rights claims, they become ‘vocal ejaculations’ or ‘propagandistic manipulations’. Douzinas confirms his view that critical legal scholars have shown us that moral justifications for rights often disguise power asymmetries and hierarchies.

474 Brown (n 435) 61.

effectively preaches a new, liberal religion to which all must subscribe. In that sense, the coerced universality that acts as the fundamental basis for rights has been questioned, and any attempt to rely on rights going forward requires that something must fill that ideological and conceptual vacuum. Here, postmodern and postcolonial feminist theory has been used in an attempt to do just that. Keeping in mind the benefit of ‘world travelling’, the role of history and power, as well as the importance of agency and choice, this work has sought to rely on a more flexible set of guiding principles to strengthen the universality of human rights, both as moral claims and to make them more effective as guardians of human dignity in practice. In doing so it is hoped that the foundational principles for rights, as well as their claim to universality, are made stronger so that the value of rights is preserved.

What, then, is the impact of all of this on women in refugee settings who are excluded from family reunification because of their polygamous marriage? The system of human rights plainly fails such women. Given they are alone, very often in an insecure environment without the protection of their home state or the state in which they reside, their emancipatory potential in the context of improving international human rights approaches seems necessarily restricted. There must surely be a limited extent to which anyone, let alone this group of women, might successfully challenge well established, pre-existing international human rights norms that have long been integrated into national systems around the globe. Further, those who oversee women’s rights in the international arena have made clear their disapproval for the practice of polygamy to such an extent that states are able to exclude polygamously married women with near impunity, whatever the impact. The exercise of state sovereignty is unaffected by human rights obligations, and—in contrast with the domestic legal treatment of polygamy—the effect is that polygamous marriages are never recognised in the United Kingdom for immigration purposes. Not only do human rights fail to provide displaced women with any support, the human rights project actually provides a firm basis for prohibitive states to maintain the status quo. The behaviour of the state cannot be questioned according to supra-national oversight. Whatever the impact on the individual, human rights seem to “... maintain their integrity by remaining normatively closed.”<sup>475</sup> The impact of this human rights ‘blind eye’ is to continue to deny human dignity that might otherwise be provided

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<sup>475</sup> Florian Hoffman ‘Foundations Beyond Law’ in Douzinas and Gearty (n 473) 84.

to a distinct category of women who, but for the plural nature of their marriage, would be considered worthy of joining their families. For displaced additional wives seeking refuge, rights are utterly disconnected with their human experience and instead, much more concerned with closed conceptions of human rights standards, generated by more influential groups who have long dominated rights discourse. In the treatment of these women we see that human rights have self evidently failed to recognise what it is, for some, to be human.

Rather than accept that end, however, this work remains rooted in a firm commitment to human rights, while at the same time, seeks to expose the factors that have influenced their modern, institutionalised form. To that end, it asks that the human rights movement focus on more than one version of what it is to be 'human'. As diverse populations continue to move in greater numbers, doing so is not only desirable but arguably also necessary for peace and security in the current climate. For this to be effective, international human rights law must once again re-define its boundaries and human rights advocates must be prepared to overcome their discomfort with a departure from Western-centric liberal values to change their entire way of knowing and engaging with other legal and social traditions.

This new way of interacting, or process of 'interlegality', offers new a way of thinking about different legal orders not as separate, but rather as interactive so that they can be mixed as a need arises.<sup>476</sup> As Mutua suggests so convincingly, it is this (rather than cultural relativism, or tolerance) that ought to be the overriding objective of any advocate for human rights, and for this to be possible, human rights must:

*... resonate in different corners of the earth, societies at their grassroots have to participate in the construction of principles and structures that enhance the human*

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476 Eve Darian Smith (n 368) 47, where she explains she takes the idea of 'inter-legality' from de Sousa Santos (n 343). It is interesting to contemplate whether the ideas of rooting and shifting and world travelling and whether they are the same as the inter-legality Darian Smith and de Sousa Santos suggest, or whether inter-legality offers more in terms of equal status, equal consideration and involvement because a starting point is not dictated. Relating to that, Adrienne Katherine Wing, 'Global Critical Race Feminism: Legal Reform for the Twenty-First Century' (2001) 34 De Jure 446 also discusses the idea of a global multiplicative identity to consider the range of identities we all possess which can privilege or subordinate us, a concept she discusses in the context of international law and human rights which have been "... developed primarily based on principles first enunciated by American and European white male scholars."

*dignity of all, big and small, male and female, believer and unbeliever, this race and that community ... what the human rights movement must not do is close all doors, turn away other cultures, and impose itself in its current form and structure on the world.*<sup>477</sup>

It is this objective that drives this work, and which is picked up in the following chapter, where a method is offered for achieving greater rights unity among diverse groups, without undoing the wider rights project.

## Conclusion

In the words of Susan Marks, a well known and highly regarded human rights academic, where once we imagined human rights as a romance, given their sometimes catastrophic failure, we are increasingly invited to imagine them as a tragedy.<sup>478</sup> This sentiment resonates at the time of writing, when the future success of the modern system of international human rights is by no means guaranteed. Human rights standards face serious practical challenges and strong ideological objections. This is particularly so in the United Kingdom where the commitment to the European system of human rights is directly under threat. Imperfections in the system of rights have long allowed states to sign up to international human rights guarantees with reservations and state sovereignty has in the past been used as a tool to limit the protection of rights. All of this means that the value of rights in providing protection in practice and the idea of rights providing universal protection from mistreatment are already undermined. Far from securing human dignity, human rights may offer states the opportunity, through cynical manipulation, to secure their own interests instead of acting for the benefit of individuals.

This chapter has privileged the problem of apparently neutral and universal rights that continue to be influenced by their history and the relationships of power which shape them and limit their effect. Whether it is the rights of refugees, or women, equality rights or rights

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<sup>477</sup> Mutua (n 40) 657.

<sup>478</sup> Susan Marks 'Human Rights in Disastrous Times' in James Crawford and Marti Koskeniemi (eds) *The Cambridge Companion to International Law* (CUP, 2012) 309.

with a more intimate impact such as the right to marry, or the right to a family life, this chapter has sought to unmask a normative defect in rights with a very practical effect. As one academic has described it:

*The notion that modern liberals press only neutral, objective, and value-free arguments in favour of liberty and equality while [anyone who has a different view] trade only in prejudicial, subjective, and judgmental moral values now faces very strong epistemological headwinds.*<sup>479</sup>

Exposing the truth behind the universal rhetoric, the example of displaced additional wives has been used to show that humanity is ranked by the rights project, and that those at the ‘bottom of the heap’ are excluded from having any influence on the content of rights, which affects both their lives and the efficacy of rights in practice. As the example of polygamous wives in refugee settings has shown, human rights do not always speak with a diverse voice. Very often, under a cloak of universality, rights serve the interests of those already in power, with those who seek rights protection more often viewed simply as:

*... a largely passive identity, defined by suffering, and waiting for vindication through the heroic agency of the international human rights system.*<sup>480</sup>

As this chapter has attempted to show, for human rights to provide adequate protection and to survive, they must continually be re-examined and, where possible, improved. For the benefit of rights and the benefit of rights bearers, the normativity of rights ought not be embarrassed to appeal to a variety of considerations.<sup>481</sup> With that in mind, this chapter has reviewed two broad categories of rights and offered two normative criticisms in reply, in proposing a refreshed approach to rights definition and implementation to address at least

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479 Witte (n 82) 1737, where he also says “...proponents of modern liberty have their own morality, grounding their arguments in deep moral beliefs, values, ideals, and metaphors – not least the foundational moral concept of human dignity on which the modern human rights revolution has been built since 1948.” Perhaps his position on rights, which seeks not to enquire at all into power, bias, either now or in history, provides some insight into his position on polygamy, where he takes a similar approach.

480 Marks (n 478) 319.

481 Charles R Beitz, *The Idea of Human Rights* (OUP, 2009) 138

some of the interrelated factors that lead to rights failures. In attempting to find a better way to understand, define and implement rights, it is better not to discard one of “... the great civilising achievements of the modern era” simply because of its imperfections.<sup>482</sup> Rather, emphasis has been placed here on the potential for rights to protect those who may remain unseen, even if it is not just states but human rights themselves that sometimes turn a blind eye. The purpose of doing so has been to plot a course through the territory where human rights and polygamy collide, and identify a role for rights that is both accepting and hopeful. In broadening the discourse on polygamy and family reunion in the refugee setting, postcolonial and anti-imperial activism on their own do not necessarily fully articulate the failure of rights, or solve the problem of human rights, however.

While they challenge the hegemonic narrative of international human rights law, there is still an extent to which additional critical approaches are needed to confront entrenched principles and ensure that human rights become more normatively open. To that end, the foundation is now laid for a refreshed feminist analysis and reply to the criticisms of rights in this chapter, as well as the domestic immigration provisions that are the prompt for this research. It is this feminist reply that now follows, in the final chapter of this work.

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482 Conor Gearty, (n 38) 1.

## Chapter 5

### The Reply: A Renewed Feminist Approach to Polygamy, Human Movement and Human Rights

#### 5.1 The Scope of this Chapter

This work has interrogated assumptions about polygamy and harm, and considered the treatment of polygamy by domestic law and human rights. This chapter offers a renewed feminist evaluation of that treatment in response to the tension exposed in each setting, recommending changes to laws and rights. As a starting point, the analysis in this final chapter turns again to the feminist redrawing of international legal boundaries by Chinkin and Charlesworth.<sup>483</sup> It takes up their early suggestion to reconsider laws and rights that have the appearance of gender neutrality and apply a feminist critique to reveal bias.<sup>484</sup> In doing so, this analysis builds on their suggestion for a systematic *deconstruction* of the misrepresentation of the ‘masculine’ as a neutral and universally applicable norm. It also adds to the core of their analysis by focusing more closely on the ‘dominant feminine’ norm as it applies specifically to polygamy.<sup>485</sup> While Chinkin and Charlesworth suggest that laws fail women in large part because of their absence from the law making elite, this chapter will develop that narrative, relying on third generation feminist thinking to consider why some women are perhaps more excluded than others. Employing identity feminism, this chapter attempts to reinforce the suggestion that the justification for the treatment of polygamy rests more on a hierarchy of difference than on substantive good reason.<sup>486</sup> To that end, this analysis is strongly rooted in Chinkin and Charlesworth’s suggestion that anyone who ignores sex and the gendered aspects

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483 Chinkin and Charlesworth (n 39).

484 Regarding ‘gender’ and its relationship to ‘sex’, see Chinkin and Charlesworth (n 39) at 3 for a discussion on this and the difference between body/nature and mind/culture, where they confirm it is generally acceptable to use the terms interchangeably.

485 Chinkin and Charlesworth (n 39), while it is accepted that men suffer forms of oppression, they confirm at 4 that the monopoly on power in secular, religious, national and international settings “... means that men’s interests are defined and accepted as apparently objective and neutral categories, to the ultimate benefit of all men.”

486 Chinkin and Charlesworth (n 39), 21 describe this hierarchy of difference as “... the illusory necessity of concepts and rules built on sexed and gendered hierarchies of difference.”



of law to deny that dominant norms are built into the structure and form of the law gravely misunderstands the nature of legal systems, adding that feminism has great potential to uncover the arbitrary nature of traditional reasoning.<sup>487</sup> This privileging of feminism in international law was, at the time of Chinkin and Charlesworth's text, both innovative and not without some controversy. This work aspires also to complicate well-established views about the law from a re-invigorated feminist perspective, albeit this time regarding the treatment of polygamy. As others have already done with regard to international law more generally, this final analysis seeks to deconstruct the legal order and re-cast the role of law and rights, by carrying out a feminist theoretical alchemy of sorts, to give a fresh and fluid quality to apparently inflexible legal and human rights boundaries which govern polygamous marriage.

After deconstructing laws and rights on polygamy, this chapter takes up the further suggestion by Chinkin and Charlesworth for *reconstruction*, by suggesting ways that immigration and human rights laws might be revised to avoid on-going injury. Traditional approaches to polygamy will not simply be dismissed for the dis-service they do to certain categories of women. Instead, in reconstructing law and rights in the context of polygamous marriage, the "transformative potential" of a refreshed feminist analysis will be harvested.<sup>488</sup> In prioritising not only women but, more precisely, particular groups of women who are traditionally less influential in informing the content of laws and international norms, this work will not only honour women as a class. It will use identity feminist reasoning to elevate those women who do not usually dominate legal and human rights discourse, with the hope of reforming laws and rights that amplify and perpetuate their subordination, even if they do so unintentionally.

In suggesting that institutions reconsider polygamy and the impact of their attitude on specific groups of women, this work aims indirectly also to critique and to broaden the legitimacy and efficacy of immigration laws and human rights guarantees, so that their claims not to discriminate, to promote women's rights and to reflect the principle of universality, might more readily be defended. By asking the state and the international community to look again at feminism and re-imagine its influence on legal rules, this chapter attempts to loosen the

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487 Chinkin and Charlesworth (n 39) 18.

488 Chinkin and Charlesworth (n 39) 60.

grasp of historically dominant perspectives on polygamy, particularly in the West. It encourages a new way of considering plural marriage, by raising awareness of the experiences of at least one group of typically less powerful women and laying a foundation for them and others like them no longer to be unheard and cast aside as an intolerable 'other' as those who govern make rules which seal their fate. This final chapter challenges that which may at first seem entirely certain; that is, the ordinarily incontrovertible epistemology that forms the foundation for traditional immigration and human rights approaches, or the 'feminist' standpoint against polygamy in support of women. It will challenge the fiction of gender neutrality that underlies polygamy prohibition and test the claim to fairness made by those wielding legal and human rights power over women in polygamous marriage. In doing so, it seeks to establish that not all women need speak with the same voice for women's lives to be improved and women's rights to be protected.

Before embarking on that analysis, given the central focus in this work on Muslim polygamy, this chapter will carry out the preliminary task of dispelling some of the prevailing myths about Islam and its incompatibility with feminism so as to discount early on what are commonly held doubts about the relevance of feminist thought in the Muslim context.

## **5.2 Feminism and Islam**

This section considers what might be described as the common association in the West of Islam with patriarchy. It investigates claims that Islam is authoritarian and discriminatory towards women, and questions whether feminism and Islam might ever be entirely compatible. While it is acknowledged that even asking these questions might be offensive to some, they are important to address in this discussion on the Muslim practice of plural marriage, given the frequent portrayal and common perception in the West of Islam as a religion which is perpetually in conflict with women's rights and feminist aims.

### **5.2.1 Western Feminist Concern**

Western feminists have long been interested in the impact of religion on the personal lives of Muslim women, who have written of the ‘pre-occupation’ of Western feminists with historic patriarchy and discrimination in Islam and their seemingly unstoppable urge to change the apparently endlessly downtrodden and oppressed lives of their Muslim sisters.<sup>489</sup> In a critique of liberal feminist aims in advocating for ‘progress’ for Muslim women, Cyra Choudhury quotes Sonia Kolhatkar, a Los Angeles based Director of the Afghan Women’s Mission and media personality, who expresses bluntly her exasperation regarding the ‘beneficent’ West, saying:

*Isn't it imperative and a little bit obvious that when we speak of Afghan women and their rights, we must listen carefully to what they themselves have to say about it? As the admirable struggles of women of color, particularly in the Global South, come to the knowledge of the West, we must remind ourselves of the validity of **their** views and hopes over **our** perceptions of what they should say and do, how they should dress and whether or not their oppression stems from being able to have an orgasm.*<sup>490</sup>

In outlining her despair, Choudhury lists those aspects of Muslim women’s lives, other than sex, which often unnecessarily distract Western feminists. These include the veil, the headscarf, or not being able to drive a car. She might well also have added marital status, specifically polygamy; a practice which Western feminists and women’s rights advocates have long derided as inherently unequal and irredeemably bad. Choudhury has also documented the phenomenon of increasing transnational feminist activism emanating in the West that focuses on how best to ‘help’ Muslim women evolve to experiencing lives with unfettered access to human rights. This activism in Choudhury’s view is based on an assumption, a throw back to a colonial mind set, that Muslim women will eventually come to value the same things that are

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489 Choudhury (n 418). Aziza al-Hibri has also strongly disputed the suggestion, established for some time in the West, that Islam is oppressive to women, saying the cause of such views is their grounding in an orientalist perspective, a hangover from colonial oppression, with the effect that the West feels compelled to ‘liberate’ Muslim women, by tearing off their veils or by breaking down their familial structures (Aziza al-Hibri, ‘Islam, Law and Custom: Redefining Muslim Women’s Rights’ (1997) 12(1) American University International Law Review 1, 4.

490 Choudhury (n 418) 153, quoting Sonia Kolhatkar “‘Saving” Afghan Women’ in ZNET, 9 May, 2002.

valued by women in the West. Other Muslim women and feminists increasingly express similar frustrations, despairing over the unquestioning showcase of Western freedoms as ‘good’ for all, and the unilateral imposition of a Western version of what it is to be ‘free’.<sup>491</sup> This urge to liberate Muslim women and the discourse which accompanies it is not only commonly presented by traditional feminists as the way to unshackle Muslim women from their oppressed lives, Muslim women themselves are also often considered too subjugated to contribute meaningfully to that debate. All too frequently, in the eyes of their Western sisters, Muslim women remain consigned to their categorisation as second class citizens, wedged between fundamentalist aims which are informed by a particular reading of Islam on one side and what has been described as a hyper-essentialised interpretation of a ‘good life’ for all women on the other.<sup>492</sup> The effect is to lock these women in an ideological impasse where they are trapped by an epistemological ‘lose-lose’.<sup>493</sup> Moreover, any attempt at deviation by Muslim women from traditional, liberal goals is met with another assumption, similarly rooted in imperialist notions, that what Muslim women require is the education which makes it possible for them to come around to the ‘right’ way of thinking so that they too can then benefit from the progress Western women have already made on their behalf.

The problem with Western assumptions regarding Islam is illustrated well by the debate over Muslim veil wearing. As discussed in the preceding chapter, the political elite—largely non-Muslim and white—has strongly supported bans on the veil in a range of jurisdictions.<sup>494</sup> The introduction of apparently neutral laws banning religious symbols in French public spaces, which directly prevented women from wearing the veil, was justified in large part by reference to the fundamental French constitutional principle of secularism, or ‘*laïcité*’.<sup>495</sup> In pointing to

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491 Asma Lambrabet *Women and the Qur’an: An Emancipatory Reading* (Square View, 2016) 2

492 Lambrabet (n 299) 2

493 Lambrabet (n 299) 2

494 The veil debate has taken place in a number of other Western states, including in the United Kingdom, where it has been the source of much controversy. The French example is chosen because it has resulted in a particularly passionate and long-standing debate, involving strong secularist and religious ideologies. See n 63) for a description of European cases.

495 Following recommendations by a Commission, appointed by Jacques Chirac and headed by Bernard Stasi to examine secularism or *laïcité*, a ban on conspicuous religious symbols in public schools followed (*Loi* 2004-228 of 15 March 2004). Thereafter, on 11 April 2011, the French legal system went further, criminalising the conduct of any woman choosing to wear a face veil, with the possibility of fines and up to one year in prison as punishment citing as authority for doing so the French Constitution, Article 1, 1958 “France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without

the constitutional prioritisation of secularism to support veil bans, French feminist aims aligned comfortably with the aims of the French state, relying on old cultural and religious stereotypes to promote essentialist ideas about Islam and its impact on Muslim women. In this context, it has been argued that the mainstream French feminist movement imposed its version of feminism on Muslim women, denying legitimacy to the voices of large numbers of women, many of whom expressed their clear wish to wear the veil for a host of different reasons.<sup>496</sup>

It is worth noting that there are, of course, also Muslim women and organisations that have taken the same view as the French feminist mainstream, expressing their opposition to the veil. Some women wish to wear a veil or headscarf to express their own complex identity, while others may resent being used politically by Muslim men to promote a pro-veil or headscarf agenda.<sup>497</sup> As one might expect, Muslims in France have not all taken the same approach to religious head covering. Similarly, not all Muslim women support polygamy and the same range of views exists about its practice.<sup>498</sup> However, the highly visible debate over whether Muslim women should be allowed the opportunity to choose to wear the veil is interesting in connection with the treatment of polygamy in part because it illustrates the urge to essentialise and eradicate such practices. In that vein, Muslim women who supported an

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distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis” where the principle of *laïcité*’ is enshrined. Adrien Wing and Monica Nigh Smith describe this sentiment as a stipulation that French citizenship and membership of the Republic is premised on everyone being French before any other identity may be claimed in their article ‘Critical Race Feminism Lifts the Veil?: Muslim Women, France and the Headscarf Ban’ 39 UC Davis Law Review 743 (2005-2006).

496 See Nazia Kazi ‘(Mis)Understanding Muslim Women: The Limits of Western Feminism’ (2006), All in the Family – Islam and Human Rights, Atlanta Law School, Georgia 3,4 March, 11 where she lists a variety of reasons for Muslim women wearing a veil or headscarf, such as because it is an essential part of Muslim identity, a way of fostering a sense of modesty and humbleness in connection with their religious beliefs, and for some as a form of defiance to governments who intend to impose on their private lives with regard to religion. In any case, what she reported as that most women who advocated wearing a head covering did so not because they were oppressed under a patriarchal religion, but rather, because they viewed it as a symbol of a greater goal.

497 Wing and Nigh Smith (n 495), 749 discuss this.

498 Women Living Under Muslim Laws (Report, n 142) 210 describe....monogamy is the ‘ideal state’, Fareda Banda, ‘Project on a Mechanism to Address Laws that Discriminate Against Women’ (Report, Commissioned by the Office of High Commission for Human Rights; Women’s Rights and Gender Unit) (6 March 2008), where she discusses polygamy. The debate on polygamy in Pakistan is also interesting, where even some traditionalists have called for its abolition, as documented in the Report of the Pakistani Commission on Marriage and Family Laws, Gazette of Pakistan, “Extraordinary”, June 20, 1956 at 1215-1218.

absolute ban were accused of promoting reductive, racist views of Muslim behaviour.<sup>499</sup> Moreover, there were some non-Muslims who spoke vehemently in support of veil wearing. One of the most notable supporters among this group was the well-known French feminist and writer, Christine Delphy, who wrote an explosive account of the misuse of feminism to disguise racism, expressing her alarm at the French government's readiness to treat Muslim women as 'others' and ignore their views.<sup>500</sup> In the context of the veil, Delphy expressed both her exasperation and anger at the principle of *laïcité* being used by the French government and mainstream women to disguise the real reason for the veil ban. In her view, the intended aim was always the derision and persecution of Muslim women, and not the pursuit of secular goals. Further, the effect of this has been, little by little, more and more, that Muslim women have become excluded from leading a free life, and as Delphy points out, somewhat ironically, this has all been required "... in the name of their emancipation."<sup>501</sup>

Others have been critical of Western feminists and women's rights advocates for failing to understand the value ascribed by many Muslim women to their religious belief, resigning not only women but religion itself to the status of 'other'—something both to be feared and excluded.<sup>502</sup> Echoing Delphy's concerns over the lack of agency permitted to Muslim women when discussing issues like the veil, in her article 'Piercing the Veil', Madhavi Sunder has addressed the divergence between dominant, negative, Western conceptions of veil wearing and the priorities which may very often shape the lives of those women who wear it. Sunder accuses the West of compartmentalising Islamic religious practices like wearing the veil as patriarchal, suggesting it would be more productive for the West to consider equality and freedom for Muslim women within the context of religion instead.<sup>503</sup> Sunder warns that choosing to ignore Muslim women is done at great cost, both for women and for society more widely. In her view, where the state ignores the importance of religion and culture to those women who wish to wear a veil or headscarf, or who enjoy other religious practices, this serves

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499 Malik (n 396) 7 quoting Mayanthi L Fernando, *The Republic Unsettled: Muslim French and the Contradictions of Secularism* (Duke University Press, 2014) 197.

500 Delphy is well known in French feminist circles, having founded together with Simone de Beauvoir the journal *Nouvelles Questions Feministes*.

501 Christine Delphy *Separate and Dominate: Feminism and Racism After the War on Terror* (Verso, 2015) xi.

502 Madhavi Sunder, 'Piercing the Veil' (2003) 112 Yale LJ 1399, 1402.

503 Sunder (n 502) 1404.

only to ignore their real concerns and strengthen the position of religious fundamentalists who pose a genuine danger, at the expense of feminist aims and women's rights.

### 5.2.2 Islamic Feminism from Within

Feminists like Sunder, who defend the compatibility of Islam and feminism, herald the increasingly perceptible drive among Muslim communities to develop norms and strategies designed to confront genuinely oppressive practices and re-frame those which are misinterpreted outside of Islam. Sunder herself advocates a 'New Enlightenment', an approach to considering Islam which aims to pierce the veil of religious sovereignty, so that the parts of religious life that Muslim women enjoy and value may be preserved, (however illogical or harmful that may seem to liberal elites) and truly fundamentalist conceptions of Islam may be challenged.<sup>504</sup> She and many others suggest that non-Muslims, and Western feminists in particular, should work harder to respect Muslim feminists and assist them in promoting this New Enlightenment. While Sunder is critical of Western, mainstream feminist judgment on Islam and its part in women's lives, she, like others who make similar criticisms, nonetheless makes clear her view that she is not advocating for acts of violence against women in the name of religion to be tolerated.<sup>505</sup> Sunder both acknowledges and condemns practices such as stonings, so called 'honour' killings and both rape and the death penalty being used to punish women for 'crimes' such as childbirth outside of marriage, all of which might be carried out according to traditional interpretations of *Shari'a* law.<sup>506</sup> Rather, those who advocate for a New Enlightenment are suggesting it is better to consider closing the gap between fundamentalist conceptions of Islam and women's rights to avoid the 'religious baby' being thrown out with the 'patriarchal bath water', so to speak, and so that violence done in the name of religion is not taken as providing a broad brush justification for condemning Islam and all Islamic practices. According to Muslim feminists, the West must acknowledge this urge for feminism from within, so that Islam is not written off as hopelessly oppressive and Muslim women are

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504 Sunder (n 502).

505 Sunder (n 502) 1405.

506 Sunder (n 502) 1405.

able to exercise free agency, and the content of laws which govern the lives of Muslim women reflect their lived experience.

Echoing Sunder's call, commentators like Azizah al-Hibri use the Qur'an itself to dispute the legitimacy of harmful Islamic practices, arguing that many of them contradict more significant Islamic concepts.<sup>507</sup> One troubling example of an obligation imposed in some Islamic jurisdictions is that of *ta'ah*, or the obligation of wives to obey their husbands, which can extend to a husband legitimately denying a wife the right to leave the family home without his express permission for fear of reprisal including lost financial support, or even divorce. *Ta'ah* has been described by one commentator writing on Islamic law and custom as:

*... perhaps the most degrading to the Muslim woman ...[diminishing] her fundamental liberties as a human being worthy of equal status under the law.*<sup>508</sup>

In al-Hibri's view, *ta'ah* persists directly as a result of misuse of *ijtihad* and may be objected to not only because it denigrates women, but—vitally in terms of the compatibility of Islam and feminism—because it is fundamentally at odds with more important Islamic principles in the context of marriage, including self-discipline, collective organisation, and mutual respect and responsibility.<sup>509</sup>

These views illustrate a growing movement among women from the global south to reject common, Western characterisations of their lives. In showing their increasing thirst for autonomy and acknowledgement, Muslim women urge Western feminists to re-consider the experiences of the 'other', to allow for the manifestation of an Islamic feminism, a vernacular which is critical of oppressive religious practices but which emerges from within Islam to dispute a narrow interpretation of the Qur'an. Instead of liberals seeking to impose a Western vision for Islam and its practice, damaging interpretations of Islam are more and more vocally being contested by Muslims themselves, who deny the legitimacy of conceptions of Islam that reflect an ethically questionable misuse of sacred texts. While some of these conceptions are

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507 al Hibri (n 489) 11.

508 al Hibri (n 489) 18.

509 al Hibri (n 489) 18.



modern, many reach back into Muslim history for guidance, to a time when Islamic leaders were much less likely to allow the suppression of free thinking in an effort to undermine the nihilistic aims of extreme groups, or a governing patriarchy, and their habit of calling anyone who disagrees with them ‘un-Islamic’ to promote and secure power.<sup>510</sup> The nature of this internal protest against male domination and violence committed in the name of religion is epitomised in the words of prominent Islamic writer and critic, Ziauddin Sardar, who, in recommending ways for classical Islam to engage with modernity has said:

*The mistake is seeing the Qur'an as the end of knowledge, rather than as a text that provides an ethical framework for the pursuit of knowledge.*<sup>511</sup>

This work has already touched on some of the sentiment in Sardar’s quote, outlining how, although firmly rooted in its historic sources, Islam is by no means static. Specifically with regard to women in the modern context, ever-growing numbers of Muslim feminist scholars are suggesting it is time to review personal laws in Islam, to develop refreshed ways of interpreting jurisprudential sources and to remove the patriarchal bias that continues to dominate many areas of Muslim personal life.<sup>512</sup> As al-Hibri suggests, women are increasingly being encouraged to be open about patriarchy and its effect on their lives, and to use their experience and their knowledge to reshape Islamic jurisprudence, to expose and resist gender discrimination. Where those who object to Muslim religious practices stick to a reductive view of religion, women who practice Islam are denied any part in the mainstream discourse that regulates them. The isolation which flows from that approach serves only to reinforce the power of patriarchal forces which operate within religious ranks, as well as to silence Muslim women, and to subjugate their experiences and their voices, ever more. Increasingly, rather than presuming that their views cannot freely be held and insisting it is Islam which must change, Muslim women argue that it is the reconsideration of feminism itself which is needed, so that the views and the experiences of Muslim women become more influential in informing a feminist conception of Islam and Islamic practices.

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510 Ziauddin Sardar ‘Start the Week’ BBC Radio 4, 16 January 2017 <<http://www.bbc.co.uk/programmes/b088b855#play>> accessed 16 January 2017.

511 Sardar (n 510).

512 al Hibri (n 489) 43. [List also Amina Wadud, Leila Ahmed, others?]

Turning specifically to the possibility of feminism from within and its approach to polygamy, the more traditional landscape of Muslim views regarding polygamous marriage has been mapped by Kecia Ali, who allocates justifications for polygamy to three broad, traditional arguments in support of its continued practice.<sup>513</sup> Described as the “battleground in on-going contests about whether Islamic law can ever be fair to women” polygamy is sanctioned in the Islamic world because men are entitled, because men have naturally greater sexual desires, and finally because women are in need of men’s protection, a trifecta of reasons which hardly seem to privilege women at all, perpetuating the impression of Muslim plural marriage as completely incompatible with modern values and women’s rights<sup>514</sup>

However, the typology of traditional support for polygamy in Islam that Ali presents is far from the final word on the rights, or wrongs, of Islamic plural marriage. As outlined before now, the application of an Islamic feminist dialogue, rather like the general discourse on polygamy itself, is far from settled, and varied perspectives exist on the nature of the benefits and detriments of polygamy for women. In this regard, Muslim feminist discourse—unlike traditional feminist or human rights discourse—allows for the possibility that women may choose polygamy over monogamy for a range of religious and other reasons. Unlike the traditional justifications presented by Ali, Islamic feminist discourse increasingly allows for the fact that Muslim women may willingly opt for polygamy, based not on patriarchal reasons, but a range of alternative arguments which come from Muslim women themselves.<sup>515</sup> This sentiment is summed up well by Michele Alexandre, writing on the possibility of a feminist conception of polygamy in particular:

*...the desire to enter or remain in a polygamous union does not necessarily equate with a diminishment of [women’s] rights and privileges. For many Islamic women the desire for autonomy and equal rights is often coexistent with their commitment*

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513 Ali (n 100) 620.

514 Ali (n 100) 622. Ali calls the three categories in her typology the defiant, polemical and paternalistic arguments which traditionally justify polygamy in Muslim jurisprudence.

515 Azizah al Hibri ‘Is Western Patriarchal Feminism Good for Third World/Minority Women?’ in Cohen and others (n 116).

*to Islam; a combination that, according to popular stereotypes of Islam, creates an untenable conflict.*<sup>516</sup>

What Alexandre suggests in order to navigate a way around old stereotypes is to ensure that women's wishes serve as a foundation for religious practices like polygamy—something that she says is made possible because Islam is inherently concerned about justice, which must also encompass the aim of equality for women. This view of polygamy is one that is demonstrably ignored in domestic law and by the human rights establishment. The content of laws which exclude polygamy and the comments of committees who oversee human rights conventions provide tangible examples of mainstream norms which give the distinct impression that feminist accounts like that offered by Alexandre are irrelevant. Certainly, there is some disagreement mainstream and other feminists, with the effect that the views of some Muslim feminists on polygamy are ignored.

The feminist engagement with polygamy may be analogised with the debates, highlighted earlier, over whether or not Muslim women should be prohibited from wearing religious symbols. Those, like many in the French feminist mainstream, who consider themselves supporters of women's rights choose to present veiling as proof that Muslim women are unemancipated, with no influence over their appearance. This perception of the veil and even the headscarf reduces it to being a mere symbol of women's oppression and makes:

*...[t]he women beneath the headscarves ... silent symbols, where national and international politics are played out on their bodies, heads and minds.*<sup>517</sup>

Such perceptions ignore the voices of many Muslim women themselves, who disagree strongly with their depiction in the discussion on religious manifestation as oppressed, and who see themselves as exercising agency in electing to wear the veil or the headscarf as part of their

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516 Alexandre (n 87) 5.

517 Wing and Nigh Smith (n 495) 747.

complex and non-binary self-identity, rather than as victims of Islamic patriarchy.<sup>518</sup> The appropriation by liberal feminists of debates on the headscarf and polygamy as well as other Islamic practices—very often while the varied views of Muslim women themselves are ignored—has been described by leading Muslim academic, Leila Ahmed, as symptomatic of the imposition of “...the Western narrative of the quintessential otherness and inferiority of Islam” which brings with it the potential for great harm.<sup>519</sup>

Accordingly, a Muslim feminist jurisprudence is increasingly being promoted by Muslim women, who seek freedom and equality within the context of their religious beliefs, rather than the freedom to seek equality outside of them. Such women identify as feminists who celebrate their faith, grounding their feminist theory in Islam and the Qur’an, something they see as being entirely compatible with feminist aims, even if that is very often in contrast to their liberal feminist counterparts. In support of a feminist programme which originates from within, al-Hibri is clear that Islam need not be oppressive to women, assigning such assumptions either to mistake, or secular bias. In practical terms, regarding the likely success in achieving equality for Muslim women, she points to the futility in feminist aims which are defined and enforced by groups with no connection to Islam:

*The majority of Muslim women who are attached to their religion will not be liberated through the use of a secular approach imposed from the outside by international bodies or from above by undemocratic governments ... The only way to resolve the conflicts of these women ... is to build a solid*

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518 The application of Islamic feminist dialogue has brought similar thinking to bear in the context of *mahr*. *Mahr* are dowry payments made on marriage from a husband to a wife according to Muslim tradition, which have been criticised as reflecting the a husband ‘buying’ wife. Pascale Fournier discusses this in some detail in *Muslim Marriage in Western Courts: Lost in Transplantation* (Routledge, 2010) at [pinpoint] saying secular liberals condemn *mahr* as the sale of that part of a woman which is most prized, her vagina. From a traditional feminist standpoint, it seems difficult to present *mahr* as anything but unequal and entirely bad for women. However, despite strong arguments against *mahr*, Fournier explains how Islamic feminists have expressed their support, conversely presenting *mahr* as one of the first symbols of female empowerment. In support of *mahr*, such feminists argue the Qur’an is anti-patriarchal, offering as it did, departure from the early Arabic patriarchal customs which oppressed women. Alongside their support for *mahr*, they argue strongly for the right to define their own religious practices according to the Qur’an, rather than being subjected to an imposed, reductive definition of Islam, produced either by men, or Western women and which presents Muslim women as victims with no voice or influence whatsoever.

519 Simonetta Calderini, ‘Women Gender and Human Rights’ in Rippin (n 168) 624, quoting leading Islamic feminist Leila Ahmed.

*Muslim jurisprudential basis which clearly shows that Islam does not deprive them of their rights, but in fact demands these rights for them.*<sup>520</sup>

The view al-Hibri and other Muslim commentators like her increasingly express, that Muslim women must find their own way and have an equal opportunity to redefine patriarchal approaches to Muslim life, is a theme with great relevance to this work. Al-Hibri recommends that, while Western women have some role in this process, it is to support not dictate to Muslim women. It is precisely that support which is the aim of this chapter. By resisting the adoption of a typical, Western feminist stance towards polygamy, and offering instead a refreshed normative and theoretical pathway, anchored in a renewed feminist approach, this work seeks to re-imagine the practice of polygamy and its regulation in the specific context of family reunification for refugee women. Where ideological differences threaten to de-rail the prospect of a feminist vernacular which is rooted in the lived experience of polygamously married Muslim women, this work takes up the invitation from those Muslim feminists who have been featured here, to allow for the possibility that such differences do not simply reflect a long history of patriarchy and religious oppression, but rather, that they may be a legitimate expression of agency for some Muslim women.

Having established that feminism and Islam are not mutually exclusive, this chapter seeks now to explain in more detail the basis for privileging feminism in the context of polygamy, human movement and human rights.

### **5.3 A Reframed Feminist Approach to Polygamy**

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<sup>520</sup> Pascale Fournier (n 518) 3 quoting al-Hibri. The comments by al-Hibri echo those made more generally by legal pluralists, like Pearl and Menski (n 98) 4, where they say “Thus much of the legal material in the Qur’anic verses concerns the very real attempt to enhance the legal position of women.” In this regard, Islamic feminists and legal pluralists share common ground, coming together in support of the Qur’an and Islamic practices such as veil wearing, *mahr* and polygamy, arguing in favour of a Muslim jurisprudence rather than the imposition of ‘Western values’ to save Muslim women from themselves and the deviant practices apparently advocated only by Muslim men.

### 5.3.1 The Basis for a Feminist Re-evaluation of Normative Neutrality

The underlying feminist assumption is that gender is central to life experiences. Feminist legal theory applies this basic assumption, considering where a gender bias operates in the development and scope of laws so that women are ignored in law making and their subordination is reinforced. The broad function of feminism has been articulated as a:

*...practice of social change that seeks to transform those relations of power ... from the production and distribution of wealth and the division of power to the construction of identities and ways of making sense of reality ... [F]eminism rewrites not only our knowledge of but also our construction of society by inscribing gender in social relations—that is, by articulating the gender differences patriarchy requires but naturalises “as the way things are” and conceals in the illusion of universality.<sup>521</sup>*

In this way, feminism might be thought of as a movement, intent on exposing the fraudulent tools of mainstream society—tools such as inclusivity, justice, universalism and equality, for instance—to expose hidden power, and the exclusion and exploitation such clandestine power allows.<sup>522</sup> This movement might also be referred to as “activating the other”, that is, the silent female participant who remains unseen because of “dominant modes of knowing”.<sup>523</sup> The feminist activation that this work aims to ignite is variously described here as a ‘re-understanding’, a ‘re-imagining’, or a ‘re-framing’—all different ways to describe the application of a refreshed perspective to one example of hidden power and its impact. The feminist re-imagining here is intended to expose the hypocrisy of those who oversee law and rights ignoring the harmful impact of prohibition on polygamous wives, while relying on concern over harm to justify their actions.

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521 Teresa L Ebert, ‘The “Difference” of Postmodern Feminism’ (1991) 53(8) College English 888, writing in the context of postmodern politics and feminist theory.

522 Ebert (n 521) 888.

523 Ebert (n 521) 888.

To that end, this work has adopted the idea of ‘world travelling’ to review the content and impact of laws.<sup>524</sup> This method of analysis shifts the balance of concerns regarding polygamy, insisting on an understanding of other women, who may not share all of the same values but whose experiences form the basis for a dialogue in the first place.<sup>525</sup> It has substantial value in reducing the homogeneity required by law and rights in practice, confronting the tension between overarching standards and local experiences, and responding to that tension by acknowledging diversity and reflecting the day-to-day reality of less visible women.

Eminent feminist scholar, Adrien Wing, has already recommended that precisely this methodology be used in connection with regulating polygamous marriage.<sup>526</sup> Wing has recommended that polygamy is considered via the lens of ‘critical pragmatism’ to privilege the needs of groups who are traditionally subordinated to avoid the imposition of Western values which unthinkingly condemn and marginalise polygamy, without ever really considering in detail the consequences of doing so.<sup>527</sup> Wing bases her recommendation on the possibility that we might:

*... see ourselves as the ‘other’ might see us, and see the ‘other’ within her own complex cultural legal context.*<sup>528</sup>

This work has begun the task of world travelling and applying that ‘critical pragmatism’ to the regulation of polygamy, in Chapters 3 and 4, which have already challenged the apparently objective treatment of polygamous wives in immigration law and human rights.<sup>529</sup> This critical

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524 Chinkin and Charlesworth (n 39) 51, quoting Maria Lugones “Playfulness, “world travelling” and loving perception’ 2 *Hypatia* (1987) 3 at 18. This is a method also adopted by Adrien Wing in her analysis of the headscarf ban (n 38) and polygamy (n 14). It was first proposed by Isabelle Gunning in ‘Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries’ (1991) 23 *Columbia Human Rights Law Review* 189, asking in this context in 1991 what right does a Western feminist have to criticise the practices of an entirely different culture, and whether or not the law should be used to attribute ‘right’ and ‘wrong’.

525 Chinkin and Charlesworth (n 39) 51, describe the rooting and shifting of European feminists.

526 Wing, Polygamy (n 14).

527 Wing, Polygamy (n 14).

528 Wing, Polygamy (n 14) 813.

529 Chinkin and Charlesworth (n 39) 60, where they quote Elizabeth Grosz, it’s a “veiled representation and projection of the masculine which takes itself as the unquestioned norm, the ideal representative without any idea of the violence this representational positioning does to its others.”

foundation will now be built on, using a range of feminist critiques to apply further pressure to the idea that the governance of polygamy is impartial, and to debunk the idea that laws and rights reflect some sort of objective feminist or other truth. Here, the disagreement among feminists is employed to reveal the importance of power structures, history and gender, which negate the impression of equality, neutrality and fair governance.<sup>530</sup> The aim is to show that the law is already woven with the thread of gendered subjectivity, reflecting and reinforcing the views of those who are most dominant, paving the way for a re-invigorated feminist approach.<sup>531</sup>

### 5.3.2 A Governance Feminist Critique

However helpful a feminist lens, the exclusion of particular groups from the feminist vernacular is commonplace and gives cause for concern.<sup>532</sup> More and more, critical commentators are pointing to disturbing and often unintended outcomes of feminist campaigning for certain groups of women. Among those recently leading that critical discourse are ‘governance feminism’ critics, introduced earlier in the discussion on legal responses to veil wearing. Critics of governance feminism object not only to essentialism and ‘othering’, but also the impulse among those feminists entrenched in powerful institutions to privilege what they consider to be socially acceptable practices, giving their own version of feminism credibility to the exclusion of other feminist discourses, regardless of the consequences for those who do not conform to the prevailing norm. The essence of the governance feminist critique is the institutionalised nature of feminist achievements, and the attitudes, priorities and relationships of power that inform the legal outcomes of feminist

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530 Halley and others (n 65) 335.

531 Chinkin and Charlesworth (n 39) 22 refers to Koskenniemi advocating acceptance of the framework of international law because, although flawed, it protects from subjectivity and political ideology. The response to that as Chinkin points out is that international law is already not objective, rather it is “... intertwined with a gendered and sexed subjectivity and reinforces a system of male symbols.”

532 It is relevant to note that feminist scholarship does not in general require that only those who experience gender-based oppression may speak out against it. Rather, by listening carefully and closely to the experiences of women, and by carefully avoiding judgment of the speaker, it is possible for anyone to engage in and understand critical feminist debate.



action.<sup>533</sup> Although credibility is attributed to those in power by an association with feminist aims, the critical approach applied here shows that their efforts have great capacity to make women with less influence much worse off because institutionalised feminist activism so often ignores large swathes of women-kind.<sup>534</sup>

The insistence on prohibiting and excluding polygamy by states and the human rights establishment is one illustration of governance feminism in action. In a similar vein to the pre-occupation of governance feminists with banning the veil, when it comes to regulating the ‘deviant’ practice of polygamy, the goal of those who govern and who have institutional power is prohibition; a goal informed by traditional liberal and dominance feminist aspirations, which unquestionably provide the tangible hook on which human rights condemnation of polygamy hangs. It is liberal feminist discourse that informs the view of polygamy as inherently unequal, a view which is then reflected in public policy and the legal denial of family reunion for additional polygamous wives. Dominance feminism is also a strong component of anti-polygamy rhetoric, and its occupation with patriarchy and men as the perpetrator of varying forms of injury to women in polygamous marriage. In this regard, feminist aims which associate men as the wrongdoer and women as the victim of their wrongdoing have become a sort of unchallengeable ‘wisdom’ when it comes to polygamy in the West, and prohibitive approaches to polygamy in law and rights are presented as the logical way regulate polygamy on behalf of all women.

The systematic institutionalisation of equality and radical feminist aims in Western legal and human rights standards have effectively allowed a limited version of feminism to become the mainstream battle cry that rationalises the rejection of polygamy. As a result ‘feminism’ legitimises public policy that calls for the unconditional prohibition of entirely valid polygamous marriages in immigration, regardless of the effect in practice for those women directly affected. The same ‘feminism’ is relied on by the human rights establishment in universally privileging traditional equality aims and relying on them to denounce polygamy in human rights standards, with widespread transnational influence.<sup>535</sup> In this way, the form of

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533 Halley and others (n 65) 336.

534 Janet Halley and others (n 52).

535 Halley and others (n 52).

feminism that is officially approved of by those who implement laws and rights is elevated to the status of an unquestionable epistemology. It is this feminist expertise which informs Western objections to polygamy as the, now irrefutable, Western feminist ideology is hardwired into the institutions with both hard and soft power over polygamous marriage. The effect is to wield great power over how things are understood, as well as what is done in relation to them.<sup>536</sup>

The work carried out by Angela Campbell regarding Mormon polygamy provides evidence in support of the idea that the imposition of one feminist truth regarding polygamy is less of a victory for women, and more an example of governance feminism in action. Her empirical research with women from the Bountiful community in British Columbia is both intimate and revealing, providing a platform for women who are often invisible to have their say about their experience of being in a plural marriage.<sup>537</sup> Professor Campbell's work reveals wives of Bountiful who commonly express a strong preference for a more nuanced response to their marital status, one which doesn't reach for simple objections to male domination or make assumptions about their inequality and lack of free choice to justify the criminalisation of plural marriage.<sup>538</sup> Although her research doesn't explicitly refer to the concept of governance feminism *per se*, her work with the women of Bountiful might be read as an indirect and informal governance feminist critique of sorts, highlighting a disjuncture between the pre-occupation of those in governance with mainstream equality and prohibition, which contrasts with the interests of those women who are directly affected. Although Mormon polygamy has a long history of being seen in black and white terms when it comes to equality and harm, the documented conversations of Professor Campbell and others like her signal the purpose in establishing a more thoughtful regulatory path through the polygamy paradox by taking

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536 Halley and others (n 52). The idea of governance feminism envisages both hard and soft aspects. For example punishment (polygamy as a crime) and softer legal prohibition (polygamy as an invalid form of marriage), administrative, legal impacts (polygamy not being recognised in immigration, gender mainstreaming/equality and human rights condemnation of polygamy). The idea here is that law itself is a method for governance feminism to travel, from human rights standards and NGOs (funded by donors with feminist aims) – to local sites of feminist engagement.

537 Campbell, (n 6) 'Bountiful's Plural Marriages' and 'Bountiful Voices' (2009) 183 where she describes the paper as a presentation of a 'counter narrative' to the popular depiction of a Mormon polygamous wife.

538 Campbell, 'Bountiful's Plural Marriages' and 'Bountiful Voices' (n 6).

account of the views of a more broad cross section of women if the aim is to achieve outcomes which are genuinely equal.

Although this research focuses on Muslim wives in refugee settings, they, like their Canadian, Mormon counterparts are more often silenced by the aims of men and more powerful women who have a seat at the institutional table. It is difficult to locate the voices of Muslim women in refugee settings in shaping the content of domestic laws that govern Muslim family reunion, or the scope of international rights standards on polygamy. Instead, the influence of more dominant, liberal feminist aims is more obviously reflected in the civilising discourse that so often dominates the discussion around polygamy and its regulation. Campbell's research highlights, in particular, the hypocrisy of criminalising polygamy when the harmful impact of doing so is considered. Her research notes that disjuncture by giving voice to the views and choices of polygamous wives themselves, noting that the harm caused by criminalisation and exclusion is frequently far greater and longer lasting for these women than any harm that might be associated with a polygamous marriage.<sup>539</sup> The reality emerging out of Campbell's conversations is that strictly enforced prohibitions on polygamy are likely to exacerbate all kinds of harm for women; a contention which is arguably all the more troubling in the refugee setting where vulnerabilities are intensified by extreme and often dangerous day to day conditions. While the state seeks to promote its role as a protector of women, what it is in fact doing in practice is engaging in a repressive form of governance which shows a complete lack of regard for women's own lived experiences where they make choices which sit outside prescribed legal and human rights boundaries.

By employing a governance feminist critique a tangible theoretical framework is provided to question what appears to be the entirely reasonable legal treatment of an offensive practice like polygamy. Those laws and rights that advocate for the complete prohibition of polygamy become capable of being seen as evidence of the rapid rise of a very Western legal feminism,

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539 Campbell, *Bountiful Voices* (n 6) 50. It is relevant to note that, harm arises out of other types of marriage, too, and there have been practical suggestions for ways to focus on harm in plural marriage and regulate the relationship – like any other – rather than ban it. But those suggestions have not so far been taken up by the mainstream, either in the form of governments, international bodies, or feminists themselves for the most part, something Governance Feminist critics would link to those who dominate when it comes to institutional power.

rather than representative of reasonable and objective equality aims. Considering polygamy within the governance feminism critique, a ‘structural bias’ in law making is revealed, one which leads to perverse outcomes for those women whose needs are neglected by the governance feminists, sometimes with grim outcomes.<sup>540</sup> A governance feminist critical vernacular highlights the exclusion of these women and others like them from the sphere of influence in both domestic and international law making, emphasising the profound effect that absence has in the shape and content of law and policy. As a result, rather than seeing absolute polygamy prohibition as soundly justified, it is capable of being re-imagined as the institutionalisation of a brand of feminism which best suits those in power. The value in doing is that which may previously have appeared beyond doubt may be challenged, so that international and domestic legal boundaries may—once again—be re-drawn.

While this work supports the employment of a governance feminist critical discourse in the context of polygamy regulation, it is important to note that it departs from Halley’s particular approach because it does not seek to ‘take a break’ from feminism altogether.<sup>541</sup> Instead, it aims both to evaluate the harmful cost of earlier feminist movements and suggest ways of moving forward which continue to reflect a broader, more inclusive, set of feminist aims. The intention is to apply scrutiny to the unintended consequences of governance feminism, to see where the law may, however unintentionally, have done more harm than good. In doing so, this work considers it entirely possible to work towards better outcomes for a wider range of women, while at the same time, offering critical reflections on the institutions and the laws which govern women’s lives. Far from abandoning feminist theory altogether, a feminist framework is suggested here which uses postmodern and postcolonial feminist methods that

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540 A ‘structural bias’ thesis is outlined by Prabha Kotiswaran in ‘Dangerous Sex, Invisible Labor: Sex Work and the Law in India’ (PUP, Princeton 2011) 86, 117. See also Prabha Kotiswaran ‘Unintended Consequences of Feminist Action’ (Paper) Kafil (2013) <<https://kafil.online/2013/02/18/unintended-consequences-of-feminist-action-prabha-kotiswaran/>> accessed 22 February 2017. A similar analysis is also provided by Shazia Qureshi, who charts the history of human rights development in her review of feminist methodology and notes UN initiatives in the 1990s to add the ‘women questions’ in human rights law discourses wasn’t enough, so intensive gender mainstreaming was introduced, to bring a gender perspective to all of its policies and programmes. It is the further contention of this work that the perspective used was that of liberal and radical feminists, not others, which is why much of human rights law reflects a governance feminist approach using those aims (see Shazia Qureshi, ‘Research Methodology in Law and Its Application to Women’s Human Rights Law (2015) 22(2) Journal of Political Studies 629).

541 Halley and others (n 65).

honour local narratives, bringing a critique of feminism and activism together, under the umbrella of a renewed feminist reply.<sup>542</sup>

### 5.3.3 A Renewed Feminist Reply

As the Chamallas typology used in the introduction to this work illustrated, not all feminists investigate the law or apply feminist theory in the same way. Feminism is not static or fixed, but a dynamic collection of theories, so that different feminisms may emerge—a process which has become increasingly common, in fact, as distinct groups have developed their own feminist discourse in an attempt to mitigate the historic and substantive limits of more dominant feminist movements. It is these new feminist projects that strongly influence the method this work uses to question justifications for the treatment of polygamy in law and rights. Relying largely on postmodern and postcolonial approaches to feminist theory, this final feminist discussion challenges the imposition of a universalised feminism which demands that polygamy is excluded in immigration law and condemned by international human rights institutions, whatever the impact. Here, the indifference that is inherent in universal bans on polygamy is brought to the fore and the proclivity of governance feminism to de-legitimise considerations which sit outside the ordinary boundaries of concern for law and rights is discussed. The role of Western feminist concerns in elevating equality and dominance, while displacing other concerns like insecurity and family relationships, is examined with the aim of privileging the voices of ‘other’ women in feminist discourse.

Providing an almost mirror image to day-to-day governance feminism, postmodern feminism encourages those who make laws and human rights to listen carefully to the views of other women, ensuring they have tangible relevance. Postmodern feminist discourse places emphasis on the contextualised nature of women’s lives, rejecting more general feminist

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<sup>542</sup> In a similar vein, Dianne Otto in ‘Power and Danger: Feminist Engagement with International Law through the UN Security Council’ (2010) 32 *Austl Fem LJ* 97, 98 talks about the thorny relationship between the normative project of feminist activism and the scholarly project of feminist critique, arguing that by only selectively engaging in feminist discourse, the actual structural causes of inequality are not addressed.

theories. The growth of postmodern feminism is illustrative of a general ‘fracturing’ of feminist ranks since the rise of critical legal scholarship in the 1990s, resulting in allegations by critical race feminists that any progress sought by women of colour was generally permitted only when it suited the white elite. Critical race feminist scholars were among the first not to accept law as neutral, pointing specifically to identity, manifested in race and gender, as the factors on which on-going oppression was based, laying the groundwork for a feminist movement completely independent from traditional equality aims to grow and requiring those who espoused liberal feminism to recognise its insular nature and limited scope.<sup>543</sup> Postmodern feminism has evolved alongside critical race feminism with the more general aim of exposing bias in universalised standards to promote laws that protect more than one expression of what it means to advance women’s rights. Rather than simply expecting marginalised women to adopt current international and apparently universal values, laws and rights, postmodern feminism offers a way of unpacking the ‘othering’ of women in any context, including in the regulation of polygamy.

In an early work presaging this more broad dissatisfaction with formal equality aims as a method of advancing the interests of women, Mary Joe Frug, writing in 1992, confirmed the existence of a blossoming scepticism about the benefit women might actually receive from simple equal treatment. In her article, simply titled ‘A Postmodern Feminist Manifesto’, Frug noted the rising importance of a more general differentiation in feminist thought as women began around this time to pursue what she called a ‘strategy of difference’.<sup>544</sup> As postmodern advocates of the time explained, by focusing on the position of women relative to men, traditional feminist discourse consigned women to binary oppositions, neither of which necessarily improved women’s lives.<sup>545</sup> The early work of postmodern scholars noted the beginnings of a general identity feminist movement, a ‘third way’ in feminist thought and advocacy; one that rejected a forced dichotomous choice or an essentialised experience. This

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543 Adrienne Katherine Wing (n 476) 446 and Wing, Adrienne and Nigh Smith, Monica, ‘Critical Race Feminism Lifts the Veil? Muslim Women, France and the Headscarf Ban’ (2006) 39 UC Davis L Review 743 provide useful explanations of critical scholarship.

544 Frug, Mary Joe ‘A Post Modern Feminist Legal Manifesto (An Unfinished Draft)’ (1992) 105 Harvard Law Review 1045. While Professor Frug was working on this piece she was tragically murdered, on April 4 1992 and this early, influential piece of work remained unfinished.

545 Ebert (n 521).

new strand of feminists were at pains to highlight the problem with reductive categorisations of women on the basis they erase differences other than gender as though they don't exist, differences which include race, religion, sexuality, class, not to mention other, tangible differences which are directly relevant to this work, such as marital and citizenship status.<sup>546</sup>

Professor Frug used the example of prostitution (and its regulation at the time she was writing) to illustrate this new, postmodern feminist thought in action. She pointed out that most laws relating to prostitution were gender neutral in that they made no distinction as to gender and applied equally to both sexes. Despite this, Frug confirmed her view that the laws governing prostitution still suffered from a 'gender lopsidedness' for the simple reason that most sex workers—the party criminalised at the time in the regulation of prostitution—were women. As a result, although it was entirely possible to argue that anti-prostitution measures were expressly disinterested in gender, in practice, their impact was very different. By targeting sex-workers rather than clients, the prohibitions acted largely to criminalise women far more than men. Suggesting that a healthy dose of legal realism be applied to this situation and in seeking to understand the 'reality of difference' in this context, Frug saw the value in postmodern feminist scholarship to assist in challenging the essentialising impulse of laws and their disproportionate gender impact. In her example, applying a 'difference feminist' understanding to the regulation of prostitution called to account the role of the law in perpetuating the idea of the dominant (that is, in this example, male) as neutral.<sup>547</sup>

Frug's use of sexual conduct and the sexual lives of women to illustrate the gendered nature of apparently neutral laws is a theme also highlighted by Duncan Kennedy in his analysis of the legal regulation of rape. Kennedy's reading of the relationship between the legal treatment

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<sup>546</sup> This recognition of different categories of discrimination arguably first manifested as the idea of 'intersectional' discrimination, comprehensively introduced and explained by Kimberle Crenshaw in her articles 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color' (1991) 43 Stanford Law Review 1241 and 'Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' Volume 1989 1 (1989) University of Chicago Legal Forum 139.

<sup>547</sup> Angela Campbell also considers the engagement of the law with sex work in *Sister Wives, Surrogates and Sex Workers* (n 6) in seeking to use empirical accounts of experience to inform the law on prostitution and noting the general failure of the juridical approach to sex work and its criminalisation to take account of nuance where morally ambiguous choices are involved, with sometimes severe implications for those women affected.

of rape and gender notes the stark difference between law in books and law in action, leading to his recommendation that—however good the initial intentions—the consequences of the law in practice are vitally important.<sup>548</sup> One of the concerns Kennedy expressed in his complex discussion on the effect of the law, is that the law on rape essentialised the role of women in society, so that those who violated customary rules about the ‘right’ way to behave would fairly be subjected to the consequent risk of being raped. In his discussion Kennedy asks the crucial question: in whose interest is it that women have essentialised, traditional identities? He answers simply, men.

Taking the concerns of Kennedy and Frug regarding the laws on rape and prostitution and applying them in the context of polygamy, it becomes possible to cast both men and dominant groups of women in the role of those who essentialise what it is to be an acceptable woman. Idealised feminist traits are required, ensuring that women who do not fit into that definition give up any hope of state support for their own identity. Such women include polygamous wives, particularly those consigned to remain alone in refugee settings, who forgotten for not being an appropriate version of ‘women’, and for whom immigration status and meaningful accessibility to human rights assistance is both conditional and denied. Like the women who have been punished by historic legal approaches to prostitution, or rape, governance feminism has played some part in informing the scope of the law so that polygamous wives are not considered the ‘right’ type of women to benefit from legal and rights protection. Further, the compartmentalisation of women in this way—as either victims who are oppressed, or women who are irresponsible and morally lacking, but either way, undeserving—denies them any real opportunity to challenge the dominant narrative.<sup>549</sup>

The United Kingdom has argued the law that excludes additional polygamous wives in immigration is neutral.<sup>550</sup> Citing the fact that it is drafted in a way which is targeted at the practice of polygamy itself and is not expressed directly to exclude those women who are in a

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548 Duncan Kennedy ‘Sexual Abuse, Sexy Dressing and the Eroticization of Domination’ (1992) 26 New England Law Review 1309.

549 Angela Campbell, *Sister Wives, Surrogates and Sex Workers* (n 6) 193 refers to juridical analyses of practices like polygamy casting women who choose it as “... either helpless victims of oppression who require the state’s protection or as freedom warriors who break the law ...” she says to really appreciate the tough choice these women have requires more nuance.

550 *Bibi* (n 192) and *Fairburn* (n 240).



polygamous marriage, both the British government and the European Court of Human Rights have confirmed that they consider this regulation to be an entirely appropriate expression of state sovereignty.<sup>551</sup> The European Court, in particular, has expressly confirmed the exclusion of additional wives is within the ‘margin of appreciation’ allowed to states when they are seeking to promote public policy aims which arise out of strong, historic links to practices like Christianity and the desire to prevent plural marriage which flows, at least in part, from that Christian background.<sup>552</sup>

Despite official claims to objectivity, however, it is possible in practice to see the same sort of gender ‘lopsidedness’ in the treatment of polygamy that Frug complained of so much earlier with regard to prostitution. For plural marriage, although the state has successfully argued at a regional human rights level that the measures it has taken are just, the reunification restrictions on polygamous families have distinctly different impacts on men and women. The domestic prohibition on polygamy is framed expressly to exclude additional wives, resulting in distinctly different outcomes for polygamous husbands and wives. Whatever the lawmakers say about the neutrality of the law and their intended consequences in drafting it, the reality is that women’s experience of immigration restrictions on polygamous families is entirely different to that of men, a fact which is wholly ignored, and arguably even considered irrelevant. The abandonment of polygamous wives in this way and the treatment of these women as evidence of the harmful practice of polygamy, so tainted they must be entirely excluded from society, is problematic for two main reasons. First, because of the havoc it wreaks, especially in refugee settings where the impact of exclusion is isolation and family separation, with all of the risk to personal safety that will most likely bring to those women involved. Second, because of its gendered quality and the disproportionate effect it has not only on women compared with men, but also on marginalised, minority women.

The universal exclusion of polygamy in immigration might also be criticised for the distressing irony it represents. Banning plural marriage to save women from harm ignores the fact such a ban will likely do women much more harm than good, particularly for women trapped in the

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<sup>551</sup> *Bibi* (n 192).

<sup>552</sup> Baderin (n 311) 231 for a discussion on the margin of appreciation, Islamic practices and human rights.

refugee setting. In this way, the regulation of polygamy bears some resemblance to the unsuccessful campaign by Catharine MacKinnon and Andrea Dworkin to have the state ban all pornography, a practice they considered irredeemably bad for women. After locating pornography at the centre of women's subordination, MacKinnon and Dworkin insisted on the absolute destruction of pornography to further women's interests and protect them from harm. So far, so much like the prohibition on polygamy and its normative basis, then. It is worth recalling, however, the attempt by MacKinnon and Dworkin completely to restrict pornography, rather than re-imagine regulatory approaches to it, was both controversial and in the end, entirely unsuccessful.<sup>553</sup> Frug referred to the arguments of MacKinnon and Dworkin as typically being based on 'hierarchical dichotomies' which were destined to fail. That is, you were either with them (in opposing the oppressive practice of pornography) or against them (in supporting any other view) and any complexity or uncertainty regarding the impact of pornography, or the lives of those women who experienced it, was not permitted. As Frug put it rather plainly, the problem with MacKinnon and Dworkin's absolutist position was that, "[N]ot all pornography is simply about women being fucked." The same might be said of polygamy. Although a different practice, it too is presented as the enemy of all women, even if in reality it will not always be oppressive for every woman who experiences it. While the harm that occupies anti-polygamy advocates—like that which is often associated with pornography—is worthy of consideration, banning all polygamy including entirely valid polygamous marriages, with no consideration of context or women's own preference, is unwelcome and unhelpful for some women.

In addition to considering *how* liberal feminism dominates feminist discourse, it is helpful also to consider *why* "...power has clustered around certain categories [of women] and is exercised against others" as Kimberle Crenshaw has put it.<sup>554</sup> Picking up the thread of the postcolonial discussion introduced in the previous chapter provides an explanation for the absence of certain categories of women in mainstream feminist and other discussions on law and rights. Those factors which have nurtured social and political hierarchies over time are directly

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553 Frug (n 544) 1072. The comments by Shah (n 11), that banning polygamy doesn't work, it just drives it underground and makes it potentially much more harmful, have some resonance here also.

554 Crenshaw Mapping the Margins (n 546) 1297, exposing how discrimination is experienced on multiple levels for certain categories of women.

relevant to the predicament that excluded wives find themselves in, explaining why certain groups of women are placed in subordinated categories. Postcolonial feminist discourse can be paired with its postmodern sister in providing historical insight into why the ‘othering’, which is complained of here, occurs. It also reveals the process of othering as a way of managing difference, which is seen as a threat to the ordinary international legal order.<sup>555</sup>

Recent discussions on vulnerability and the legal subject are also helpful, in providing a framework to examine and articulate the lack of autonomy very often ascribed to women in polygamous marriage. According to this idea, it is simply impossible to imagine that any woman would choose freely to enter into a non-monogamous marriage, meaning those in power are entirely justified in providing the ‘protection’ offered by laws which reject polygamy. Considering the role of vulnerability and its relationship to privilege and disadvantage, Martha Fineman has questioned the nature of state responsibility towards the ‘vulnerable subject’ in an effort to redefine the parameters of state responsibility to give lived experiences and the human condition greater weight in law making and promote a more equal society.<sup>556</sup> While this work does not aspire to ‘sidestepping’ the role of the state or the human rights establishment in considering polygamy, the work of Fineman might be used to challenge the false consciousness often attributed to women in polygamous marriages (itself an assumption which arguably arises at least in part out of colonial approaches to the treatment of non-Western women, so strongly objected to in postcolonial feminist discourse.) In that regard, the lived experiences of the women who are the focus for this research are ignored, either because they are considered irrelevant, or because they are not believed.<sup>557</sup>

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555 Otto (n 396), describes non-white, non-elite as the ‘subaltern’ who are considered a threat to the international legal order, rather than having dynamic or transformative potential.

556 Martha Fineman ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale JL & Feminism* 1 and *Vulnerability: Reflections on a New Ethical Foundation* (Ashgate, Farnham 2016). Fineman considers the topic of vulnerability in the context of plural marriage directly in ‘Vulnerability and the Institution of Marriage (The Evolution of Plural Parentage: Afterword)’ (2015) 64 *Emory Law Journal* 2089, explaining that considering polygamy within the framework of vulnerability allows one to sidestep rights claims, an aim this work does not pursue, in part because of the fundamental commitment to the rights project. See also Marvel, Stu ‘The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same Sex Marriage’ (2015) 64 *Emory Law Journal* 2047 for a vulnerability insight into the role of children in plural marriages.

557 The potential for empirical studies to reveal ‘hidden’ populations is noted by Angela Campbell in *Sister Wives, Surrogates and Sex Workers* (n 6) and it undoubtedly has the capacity to assist in highlighting the unintended consequences a governance feminist critical analysis seeks to highlight, as Campbell’s own empirical research with the Bountiful community attests.

Ultimately, what postmodern and postcolonial feminism and the focus on vulnerability all require is for the establishment to recognise the experiences of women from groups which exist outside the inner circle of rights activists and law makers. Those women who are denied family reunion are one group firmly banished to the periphery, facing a limited choice between forced assimilation or complete exclusion. It is hoped this discussion shows that, although that response to polygamous wives might seem reasonable at first glance, it is both unsatisfactory and unfair. Quite what the state ought to do in response to that revelation is what occupies the final part of this work. The paradox presented by polygamy is now considered in practice, as this work makes suggestions for improvements to immigration law and human rights which take account of the historic subjugation and the on-going segregation of less powerful women from polygamous, refugee families.

## **5.4 The Outcome: The Polygamy Paradox and Reform**

### **5.4.1 The Basis for Law Reform**

This chapter has encouraged a move beyond the dominant polygamy narrative of patriarchy and gender inequality, which justify prohibition as a universal, beneficial to all women. It is hoped that the earlier analysis of polygamy has laid bare the shaky foundation for that reductive account of polygamy and exposed strictly prohibitive approaches to polygamy as problematic. The final task is to articulate how formal responses to polygamy might better reflect a more diverse form of equality and more readily take account of the day-to-day reality of different women in polygamous marriages. This work is premised on the position that such an approach to polygamy is possible in the immigration context without compromising on gender fairness or ignoring harm, which almost everyone who is concerned with the regulation of polygamy agrees ought to be at the centre of any regulation. It intends now to show how that might be done, in practice.

This idea of better regulating polygamy for the benefit of those who are in plural marriages is not of itself completely novel. The work of Adrienne Davis in shifting the debate on polygamy away from criminality and towards the possibility of regulation has been significant in this regard. Davis has reflected on whether the law is ‘up to’ regulating marital multiplicity, turning to areas other than family law for guidance to do just that. Enlisting commercial partnership law to address the essential elements of polygamous marriage—like ensuring fairness for multiple partners, governing entry, exit and the management of resources—Davis has proposed rules which make the regulation of plural marriage entirely plausible. In doing so, she also emphasised the evolution of a similar process regarding monogamous marriage, during which women increasingly demanded changes to the historic domination of dyadic marriage by men, forcing the introduction of legal rules which now govern marriage more fairly.<sup>558</sup> Davis points out that, in fact, most of the complaints we now make about polygamy have historically also been made at one time or another about ordinary, monogamous marriage (including domestic violence, marital rape and civil subordination, for example) and notes that dyadic marriage wasn’t criminalised or abolished as a result. Although Davis acknowledges that gaps remain in her suggestions for the reform of polygamy, she is nonetheless perplexed as to why it is still so often impossible for more prohibitive societies to imagine the regulation of polygamy in practice. While polygamy continues to be linked with inequality and exploitation, Davis’ work is a reminder that these things are not necessarily inherent in the practice of polygamy, and it is perhaps more helpful to consider marriage regulation the solution, rather than the abolition of plural marriage altogether.<sup>559</sup>

Professor Davis resists the common urge to adopt essentialist ideas of monogamous marriage as good, and plural marriage as bad. Instead she chooses a consequentialist approach, which prioritises whether or not the negative effects of plural marriage can be mitigated. She shows her support for a more inclusive feminist approach in doing so, saying:

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558 See the discussion on the introduction of fairer legal rules in marriage in the United Kingdom at (n 95).

559 Davis (n 9), 2036 “There is no good reason why we could not recognise and regulate polygamy to ameliorate many of its illiberal aspects.” Davis talks about the myth of ‘heterodyadic’ marriage which is held up as being an exemplar of formal intimacy. It is worth noting here again the various feminist arguments in support of polygamy and that it can ‘cut both ways’, with numerous practical benefits to women. Emens (n 9) 333 says in terms of ‘cutting both ways, that traditional feminist concerns can’t be enough to object to plural relationships, unless they’re also enough to object to traditional monogamous marriage because it has long oppressed women and continues to do so.

*Opposition to polygamy as intrinsically bad for women exposes a feminist longing for a universal, idealized feminist gender subject.*<sup>560</sup>

In this regard, Davis' work is significant in offering a credible framework for the domestic regulation of polygamous marriage, which in turn is helpful in replying to those critics who allege polygamy is so irredeemably bad it must be excluded at all cost. Her work creates an opening for a more permissive approach to polygamy, an approach which is also suggested in this work.<sup>561</sup>

Davis is also not alone in advocating for change. Martha Nussbaum has suggested the legal arguments against permitting polygamous marriage in the West are increasingly weak, even if she does qualify her blessing for polygamy on the basis it must always be 'sex-equal' by being available on identical terms to both men and women.<sup>562</sup> Bailey and Kauffman, writing in the domestic Canadian context, also advocate for the expanded legal recognition of polygamous marriages. Although their recommendations differ from Davis in that they do not advocate the opening up of civil marriage to multiple parties domestically, as this work does, they see benefit in the broad recognition of marriages which are validly entered into abroad. Increasingly, others are also advocating for changes in the formal approach to polygamy. As a result, is fair to say that the arguments in favour of law reform regarding polygamy are, slowly, on the rise.<sup>563</sup>

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<sup>560</sup> Davis (n 9) 2038.

<sup>561</sup> It is perhaps important to distinguish Davis' suggestions for the domestic regulation of polygamy and the aim of this work which has the much the more modest ambition of simply extending the current domestic recognition of valid, foreign polygamous marriages to family reunification for refugee families. While Davis supports legalising and regulating polygamy, the objective of this work is only to take what might be described as dipping a theoretical toe in the same intellectual pond. While the focus for this research has much in common with the matters raised by Professor Davis, this work does not go so far as to call for the legalisation of all plural marriages.

<sup>562</sup> Martha Nussbaum 'A Right to Marry? Same-Sex Marriage and Constitutional Law, Dissent (Summer 2009) <<https://www.dissentmagazine.org/article/a-right-to-marry-same-sex-marriage-and-constitutional-law>> accessed 17 March 2017).

<sup>563</sup> Michele Alexandre (n 87) who warns against western centered analysis within unique Islamic settings and recommends women should be able to decide for themselves whether polygamy is appropriate for them. Adrienne Davis (n 9) asks whether it is better to ban polygamy and punish anyone engaged in it, or whether it might be effectively regulated adapting commercial partnership rules. In this regard, Alexandre and Davis are respectively suggesting that the empowerment and protection of women within the framework of polygamous marriage is possible and even necessary, to reconsider traditional feminist views on polygamy and consider the possibility of its practice and who also advocate for the possibility of changing women's lived consequences of polygamy women's

In consideration of increasing calls for a more legally permissive stance towards polygamy, it is helpful to turn again to the work of Angela Campbell and her suggestions for practical guiding principles for policy development in this area. In considering the regulation of family lives, Campbell's recommendations include prioritising respect and dignity for all, while at the same time considering the lived reality of those affected and the existence of diversity among women. In addition, she sets the goal of keeping families together where it is clearly beneficial to do so, especially for mothers and their children, to avoid triggering harmful outcomes which may devastate the lives of those affected.<sup>564</sup> Although the focus for her suggestions is the domestic legal sphere in Canada, nonetheless, there is much merit in their broad application. Keeping her guidance in mind, this work now seeks to make recommendations for a more equitable and principled approach to domestic immigration laws and international rights standards, so that they respond more fairly and effectively to the needs of women who are displaced and who face family separation because of their marital status.

## **5.4.2 Domestic Law Reform**

### **5.4.2.1 The Recognition of Polygamy in Immigration**

The law in the United Kingdom contributes to the norm of monogamy in many different ways, by criminalising bigamy, by not recognising purely religious additional marriages and by prohibiting valid polygamous marriages from family reunification rights for migrants. It is that final aspect of domestic law which occupies this work because of the deceit of its justification on the basis of harm, its inconsistency when considered in light of other domestic legal responses to valid polygamous marriages, and most importantly, its potential to cause great hardship to marginalised and displaced women.

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rights. The work of Emens (n 9), Duncan (n 88) Sigman (n 78), Faucon (n 66), Choudhury (n 175) providing support for the recommendations Campbell makes regarding polygamy in her Status of Women Canada Report (n 166) 36.

564 Campbell Status of Women Canada Report (n 166) 36 for recommendations, under the headings Guiding Principles and Recommendations.

The current discourse on polygamy and immigration, which originated around the time of the introduction of the very restrictions this work challenges in 1970s and 1980s Britain, allows for scant consideration of whether or not people are fleeing war, poverty or disaster, experiencing great hardship along the way.<sup>565</sup> Given the likely motivation for immigration policy is the repudiation of difference, rather than protection from harm, it is perhaps not difficult to see how domestic restrictions on polygamy have evolved to become:

*... [a] one size fits none behemoth that has left a trail of collateral damage  
for over one hundred and fifty years.*<sup>566</sup>

As a result, this work recommends the law on spousal migration be changed to allow for the possibility that polygamous families may be reunited and re-settled together in the United Kingdom, in particular where those families are displaced as a result of conflict, insecurity or for a reason connected with the Refugee Convention. This work does not advocate more broad recognition of polygamy, either in migration or domestically, choosing to distinguish those families for whom the issue of relative harm is significant. In the refugee setting, women who are denied reunion are much more susceptible to physical, sexual, financial and emotional hardships, outcomes which research shows are even more likely to be suffered by women who are alone. For this reason, the on-going prohibition on entry to the United Kingdom continues to inflict particular injury on a marginalised and already beleaguered group of women. As a result, this work recommends that immigration legislation and rules be re-drafted with sufficient flexibility so that the evaluation of harm carried out in the domestic legal sphere becomes a transferrable tool allowing entire polygamous refugee families to reunite.

In recommending reform, this work does not suggest judicial activism, or even juridical reform as the primary way forward. First, because the specificity of the law relating to polygamy currently allows little scope for the sort of activism that Shah and other legal pluralists like him might hope for. Second, because constitutional challenges akin to those that have been made in Canada and the United States are not really possible in the same way in the United Kingdom.

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<sup>565</sup> As already discussed (n 26) polygamous wives may submit a claim for asylum in their own right, however, such claims involve additional hurdles.

<sup>566</sup> Sigman (n 78) 102.



The HRA is not supreme law and the only ‘remedy’ available would be a declaration of incompatibility, which may have only a very limited effect in practice. For these reasons, the path of reform preferred is policy and legislative change. This process might even be prompted by an updated Law Commission report on the interaction between the law and polygamous marriage, given the length of time since it was last considered. Whatever form legal change might take, in this process, instead of allowing what one commentator has referred to as ‘imagined harms’ to inform the treatment of polygamy, it is hoped that empirical accounts of polygamy like those produced by Angela Campbell would be sought and given more weight.<sup>567</sup> Although Campbell recognises that doing so will not, of itself, necessarily *reform* the law, she points to the capacity that this sort of acknowledgement has to *inform* the law. Oversimplified perspectives on choice, harm, coercion and victimhood are able to be tested, and the agency of women who are ordinarily disenfranchised may be given voice.<sup>568</sup> In this way, a practical paradigm is offered through which the damage done by governance feminist approaches might also be mitigated.

One might well ask, does this paradigm for reform recommend turning to the very institutions this work has criticised? In one sense, yes, it does. However, it also requires that domestic agencies, NGOs and inter-governmental entities engage in reform via a process of ‘world travelling’ and that they avoid simplistic and distorted binary interpretations of additional polygamous wives as either victims or villains as they reconsider the formal treatment of polygamy. Should they do so, this sort of reform has the potential to benefit women whose lives and needs sit outside ordinary modes of knowledge production and practice, including the women contemplated by this research, who are overlooked within the ambit of immigration and human rights law. On the other hand, not doing so will inevitably perpetuate bitterly ironic, unfair and unproductive outcomes.

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<sup>567</sup> Sigman (n 78) 107 discusses the ‘disconnect’ between the empirical reality of polygamy and law and policy enforcement, which emphasises ‘imagined harms’. Angela Campbell in *Sister Wives, Surrogates and Sex Workers* (n 6) goes one step further in seeking to establish a framework which considers the experience of women who make controversial choices .

<sup>568</sup> Campbell, *Sister Wives, Surrogates and Sex Workers* (n 6)

#### 5.4.2.2 The Bigamy Hurdle

In contemplating domestic law reform, it is necessary to deal with criminal prohibitions on bigamy and whether or not they might exclude the possibility of changing immigration laws on polygamous marriage. Bailey and Kauffman address this point in their examination of the appropriate response to polygamy in the West, where they consider how it might be possible to reconcile the cultural and legal commitment to monogamous marriage with extending recognition to valid, foreign polygamous marriages.<sup>569</sup> Like Bailey and Kauffman, this work has distinguished bigamy (the practice of entering into concurrent, civil marriages in the United Kingdom) from polygamy (including both valid, foreign polygamous marriages, and purely religious additional marriages entered into in the United Kingdom) from the outset. Given the very different nature of bigamous and polygamous marriages, the suggestion here to expand the recognition of polygamous marriage in the immigration sphere is not considered inconsistent with laws against the crime of bigamy. In fact, it is more appropriately described as being in line with the current legal treatment of entirely valid polygamous marriages in contexts other than immigration, which conflicts laws and public policy have long dictated ought to be recognised, especially where the interests of family members (most often, women as legal spouses) are better protected by doing so.

#### 5.4.2.3 The Public Policy Hurdle

The question remains whether, by allowing polygamous families to reunite, the United Kingdom would be breaching its own public policy aim not to encourage the formation of polygamous households. The Law Commission, the body responsible for law reform in the United Kingdom, has itself confirmed that although public policy does not permit the promotion of polygamous households, as long as plural marriage is not legally permitted here and as long as no British domicile may contract a polygamous marriage abroad, the law cannot be regarded as encouraging polygamy.<sup>570</sup> Using the Law Commission's own reasoning, public

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<sup>569</sup> Bailey and Kauffman 'Should Civil Marriage Be Opened Up To Multiple Parties?' (n 8) 1747.

<sup>570</sup> Regarding public policy and its scope for determining reasonable restrictions on the recognition of polygamy for any rights and obligations, the Law Commission Report (n 250) 14, paragraph 37 discusses this, saying "...the law ought not to ... encourage polygamy

policy does not provide a sound basis universally to reject polygamy in immigration, at least not without some pause for thought and further explanation by the state. In fact, the Law Commission's views suggest that it is entirely appropriate for an evaluation of harm to be carried out for migrants—just as it is for those already in the United Kingdom claiming rights on the basis of their plural marriage. Where women may otherwise be left to experience hardship far more damaging than any harm thought to be associated with the plural nature of their marriage, the importance of considering harm in the context of polygamy and immigration becomes particularly meaningful. For displaced women and refugee families, undoubtedly categories of migrants who are often those most at risk, the state's obligation to reconsider the formal treatment of polygamy seems all the more pressing. Using the Law Commission's own reasoning again, where the effect of the law is repellent to one's sense of justice, for example because it causes more harm than good, it is wrong not to recognise that and provide some relief.<sup>571</sup> In suggesting it is incumbent on the government to think more carefully about harm and public policy when it comes to laws which restrict polygamy, this work is suggesting it do no more (and no less) than it already does outside of the immigration sphere, where harm is taken into account and where rights emanate from polygamous marriages where it would cause more harm to the individuals concerned not to do so.

The issue of public policy has been considered in some detail by John Murphy, writing on rationality and cultural pluralism in the recognition of foreign marriages, who examined the

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... However, so long as English law refused to allow a polygamous marriage to be celebrated in England, and so long as a person domiciled in England cannot contract a valid polygamous marriage anywhere, English law cannot be regarded as 'encouraging' polygamy." Using the Law Commission's own reasoning, reasoning which formed the basis for changes to the law in the form of the Matrimonial Causes Act and the Private International Law (Miscellaneous Provisions) Act, the recognition of polygamy for immigration purposes does not conflict with the state's stated public policy aim of not wanting to encourage the formation of polygamous households. The Commission goes on in the next paragraph to say that it is right "... that immigrants to England are not in a privileged position and are expected to conform to English standards of behaviour." However, as this work argues, provided the law targets such 'standards of behaviour' rather than any given type of marriage, to the extent such standards may require no breach of the criminal or other laws, may still be achieved within the paradigm of a polygamous marriage, just as they may in a monogamous one. Bailey and Kaufman (n 8) 1752 ask how long can the history of recognising foreign valid marriage exist along side a commitment to monogamous marriage which informs the public policy considerations denying certain rights to those marriages? They go on to suggest that expanded recognition of valid foreign marriages is not inconsistent with the suggestion to keep plural marriage illegal domestically.

571 Law Commission (n 250) cite the British Columbia case, *Lim v Lim* [1948] 2 DLR 353 saying "[T]he implications arising from refusal to recognise the plaintiff's status for the purpose in question are so many and so repellent to one's sense of justice that it is with regret that I come to the conclusion [not to recognise the marriage and provide relief]".

location of public policy objections to polygamy in religious, cultural and general objections to social and economic harm.<sup>572</sup> Murphy reasoned that the heavy reliance by the European Court of Human Rights on Christian heritage arguments made by the United Kingdom in the *Bibi* case were unconvincing given the more plural and secular nature of society today. He also dismissed the idea of more general cultural objections to plural marriage, calling references to culture an ‘out-dated yardstick’ to measure whether polygamy ought to be accepted, or not.<sup>573</sup> Pointing to the domestic recognition of polygamy in other contexts, as this work has done, Murphy was also highly critical of using the tradition of monogamous marriage to justify rejecting polygamy in immigration, alluding to it as a policy rooted in racism and which is untenable given it emanates from white, Western objections to a form of marriage practised more often by people of colour from Asia, Africa and the Middle East.<sup>574</sup> Finally, with regard to social concerns and the economic cost of polygamy, Murphy suggests there is an absence of data to support these concerns, and in any event, there is a point of principle in the day to day impact of immigration restrictions which prevent women from reuniting with their families; a principle which ought to weigh more heavily in favour of women as competing needs are balanced. This final point undoubtedly resonates all the more strongly in the refugee context.

Murphy’s views on public policy go directly against the reasoning of the European Court on states’ right to exclude polygamous families, and might be considered controversial for that reason alone. Despite that, there is certainly merit in his general belief that it is not enough for the state or anyone else simply to rely on a public policy discretion that provides the power to prohibit polygamous marriage, as though the basis for that prohibition is so obvious it requires no further analysis or explanation.<sup>575</sup> This is particularly so in the current climate of increased insecurity, consequent human movement and the rise of nationalist and populist rhetoric. More than ever the state and courts must be called on to explain their reliance on general public policy justifications for immigration restrictions to avoid the accusation of cultural

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572 Murphy, John, ‘Rationality and Cultural Pluralism in the Non-Recognition of Foreign Marriages (2000) ICLQ 643.

573 Murphy (n 572) 649.

574 Murphy (n572) 652.

575 Murphy (n 572).

imperialism and irrational adjudication.<sup>576</sup> In this regard, the concern Murphy expresses about the negligent reliance on public policy to exclude polygamous families challenges assumed values and seeks to highlight the silent, structural bias which works against marginalised groups because the values of the ‘other’ aren’t valued or even considered at all. Seen in this light, Murphy’s claim that the state must answer accusations of imperialism and racism with regard to the exclusion of polygamy on public policy grounds appears both familiar, and more reasonable. Such claims have been made more generally regarding the development of immigration restrictions for many years now, and are never more relevant and in need of being addressed than they are at the time of writing. In addition, Murphy’s suggestion echoes both postcolonial and governance feminist critiques already adopted by this work, in challenging the existence of a self evident, universal notion of public policy which represents an accepted, dominant ideology. Rather like the criticisms of mainstream feminist approaches to polygamy mentioned earlier, the prioritisation of what Murphy refers to as a ‘low level’ principle (public policy) over the lived experiences (often to include gender based harm) of human beings shows a problematic disregard for human dignity in treating those affected as a ‘non-issue’, not worthy of further consideration. As Murphy explains, the source of the offence is not in the prioritisation of values of others because, according to him no balancing takes place, as the values of others are not considered at all.<sup>577</sup>

In his strong criticism of public policy involvement in polygamy regulation, Murphy is primarily concerned to ensure those who are responsible for laws that exclude polygamous families are forced to articulate specifically the basis for their approach. In his view, doing so would ensure that decision making is more rational and less likely to be based on cultural imperialist assumptions. Murphy’s recommendations are reinforced by the more general concern for practicality, emphasized by Emily Duncan, who suggests there is also value in privileging practicality over vague notions of morality when it comes to making law.<sup>578</sup> Alongside Murphy’s preoccupation with making decision makers more openly accountable, Duncan derides any reliance they place on immorality alone, suggesting that the governance of marriage and immigration does a disservice to society by not privileging the practical impact

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<sup>576</sup> Murphy (n 572).

<sup>577</sup> Murphy (n 572).

<sup>578</sup> Duncan (n 88).

of the law instead. In this regard, Duncan outlines a scathing catalogue of practices commonly associated with polygamy, including incest, child abuse, physical and emotional abuse, domestic violence, underage marriage, limited educational and employment opportunities for women. Despite that, she goes on to recommend that public policy governing polygamy ought not to be overburdened by questions of morality, but rather, more concerned with practicality so that the regulation of polygamy is truly effective, and the state doesn't reduce its ability to be effective by focusing on what might generally be considered 'immoral'. In part, this is because in some cases that may change (she cites alcohol consumption and the prohibition which also drove that underground, as well as prostitution which has also experienced a change in formal approach to make it less harmful). She is also at pains to point out, not all of those men engaged in polygamy are abusive to their wives and children, and cites one study in support of this point, which says that the problems often associated with polygamy are really the function of those families which are particularly dysfunctional, and not actually representative of problems which are inherent to polygamy itself. For these reasons, Duncan recommends that emphasis be placed on the efficacy of polygamy policy by focusing on the negative practices that are sometimes associated with polygamy, instead of making polygamy itself a crime.<sup>579</sup>

In this way, the work of Duncan and Murphy combine to provide convincing arguments for the reconsideration and redefinition of public policy when it comes to the regulation of polygamous marriage, a suggestion supported by this work. To promote credibility in formal decision making and in order to make more sound decisions, those who rely on public policy as a method of informing legal rules must resist lazily referring to policy justifications which are impractical, imperialist, and even, in the current climate, out-dated. Given the membership of society in Britain, the number of religious polygamous marriages which are said to exist here and the impact of non-recognition on those involved, formal resistance to polygamy on the basis of a particular religious or cultural heritage is no longer as convincing as it may once

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579 Duncan (n 88) 334. Duncan quotes Bella Stumbo in the LA Times, who writes after interviewing polygamous communities in North America that it is unfortunate that the 1% of renegade polygamists stigmatise the other 99% who are peaceful and law abiding (Bella Stumbo, 'No Tidy Stereotype; Polygamists: Tale of Two Families, LA Times May 13 1988, Part 1, at 1).

have been, and the hypocrisy of relying on confused conceptions of harm to exclude vulnerable refugees is self evident.<sup>580</sup>

One might argue that the recent rise in nationalist rhetoric among citizens and politicians alike weakens any suggestion for greater recognition of polygamy. In fact, it is more reasonable to argue that the rise of populism and hate speech against those who are ‘other’ serves only to reinforce arguments in favour of change. It is inherently dangerous to allow the state to use restrictions on polygamy to garner support from rising nationalist voter bases, all while it fails properly and more substantively to justify its policy on polygamy and ignores the impact of that policy in practice. Where the policy makers reject difference for its own sake, they must be required to provide a fundamental justification—authoritative good reason, ideally which is tied to the practice itself—for doing so. In the event the state does not review its response to polygamy, particularly in the context of displaced families seeking refuge, the United Kingdom’s treatment of plural marriage will continue to illustrate the paradox of polygamy in practice. That is, in hoping to protect women from harm, the state justifies the universal ban on polygamy on its assumption that prohibition provides the best protection, while in reality it is very often women who are most badly affected by an unqualified ban. As suggested before now, it cannot be acceptable for the state simply to rely on its own discretion in defining policy as though the concerns on which that policy is based are obvious.<sup>581</sup> The paradox in this case makes it all the more essential that the state re-examine its formal treatment of polygamy, especially for refugee families, or provide a more detailed explanation of the reasoning behind the policy which results. Such a suggestion does not automatically result in the removal of the

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580 The exclusion clauses of the Refugee Convention, and in particular the criminality exclusion clause of Article 1F use, in part, a harm principle as a basis for excluding those who would otherwise meet the definition of a Convention refugee, on the basis of potential harm to the host country. While it is accepted that the host country should not be forced to bring harm upon itself by accepting a refugee (who by definition is at risk of harm in his host country) this rationale is only invoked in relation to serious criminals, war criminals, etc. making the resistance to the use of ‘harm’ as it has been discussed in this context, and as it might be referred to in a public policy sense, reasonable.

581 Murphy (n 572), see also Joost Blom, ‘Public Policy in Private International Law and Its Evolution in Time’ (2003) 50(3) *Netherlands International Law Review* 373 regarding the meaning and purpose of public policy, as well as the evolution of values which inform public policy, over time. Public policy is also discussed in Bailey and others, ‘Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada’ in Campbell and others, ‘Polygamy in Canada’ (n 69) specifically with regard to recognising foreign, valid polygamous marriages where doing so does not violate Canada’s essential ‘public policy, concluding that such recognition would not imply endorsement of polygamy or the gender inequality ordinarily associated with polygamy.

public policy hurdle altogether. However, it does lower that hurdle to make space for the domestic legal reform this work recommends.

### **5.4.3 Human Rights Law Reform**

Alongside recommendations for domestic law reform, this work seeks to address the injustice experienced by refugee women in polygamous marriage in the context of human rights. In the context of displaced women and polygamy, as the previous chapter explained, a variety of rights is engaged: refugee rights, women's rights, the right to marry, the right to a family life and others. Rights balancing is inevitable. Many feminists have argued that, in working out which rights should prevail over others, it is women's rights which inevitably suffer because of the structural patriarchy which already exists, meaning "... when rights compete, women lose out".<sup>582</sup> The real battle is that all too often rights simply serve the status quo, so that they fail to privilege those most in need. The challenge to existing power bases by postmodern and postcolonial feminists, together with governance feminist critics, is useful in this regard to highlight the limited utility of liberal equality rights for marginalised groups of women. While 'human rights hawk feminists' are allowed to dominate rights discourse, even where they are well intentioned, the needs of distinct categories of minority women are not being addressed by international human rights standards.<sup>583</sup> As a result, it is necessary to re-examine the feminist credentials of human rights protections.

This is crucial in the context of polygamously married, displaced women, for whom restrictive family reunion laws which exclude them will result in indefinite and very difficult periods of family separation, during which they are very likely to experience harm in excess of coping with the ordinary challenges of a refugee environment. For that reason, this work recommends that the human rights establishment reconsider its universal condemnation of polygamy and rethink international human rights standards so that differences among women are both recognised and catered for and the experiences of subordinated women have much more

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<sup>582</sup> Jill Marshall, 'Feminist Reconstructions of Universalism and the Discourse of Rights' (2009) *International Journal of Law in Context*, 1.

<sup>583</sup> Choudhury (n 418) 155.



influence on the content and scope of human rights guarantees. This call for change may be considered radical, but it is necessary to address the quiet and pervasive enemy of patriarchy and cultural dominance in the human rights structure, so that international legal boundaries no longer entrench the subordination of less powerful women.<sup>584</sup>

Calling for change in this way brings to mind again the idea of world travelling, useful in analysing the intersection of law and culture and advocated earlier in this work, with the aim of Western rights scholars and activists overcoming their default setting and showing empathy with those who are ‘other’. Eve Darian Smith has invoked the comparable idea of an ‘interlegality’, whereby those who dominate in global legal terms treat other’s legal traditions as equal.<sup>585</sup> This method arguably encourages an even greater degree of understanding than world travelling by not dictating a starting point. With interlegality, legal systems are not separate things that collide, rather they interact and mix together from the outset. Darian Smith doesn’t just suggest this method, she insists it is necessary for the very survival of human rights, pointing to:

*...[an] emergent insistence among non-Western societies to acknowledge alternative legal conceptualisations and norms that may not easily correlate to what we in the West recognise as the rule of law and related notions of rights and justice.*<sup>586</sup>

Darian Smith’s suggestion that rights consider the context in which they work, as well as the effect that they have, is indirectly acknowledged by those who monitor rights themselves. As

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584 A suggestion backed up by TWAIL scholars. See for example, James Thuo Gathii (n 40) at 44, quoting Mosope Fagbondgbe who has outlined her agenda as “... the formulation of human rights norms and the development of alternative strategies ... to facilitate not a mere reformation but a radical overhaul of international human rights law for the benefit of the Third World and Third World Women in particular.” She argues for this to address the imbalances and the disproportionate poverty, need and deprivation of third world women. Gathii says the “... very important work TWAIL feminists have undertaken, to critique the patriarchal customary and religious norms and practices in the Third World and the manner in which the language of rights of often mobilized to entrench rather than end such norms and practices...”.

585 Darian Smith (n 368) 47. Darian Smith describes the West as likely to continue to dominate globally for some time to come, and suggests an ‘interlegality’ approach. De Sousa Santos introduces this idea in his text at (n 343) at 97, where he describes it as a “phenomenological dimension of legal pluralism”.

586 Darian Smith (n 368) p 47.

the Committee with oversight of CEDAW explains in one of its General Recommendations, the underlying causes of discrimination against women must be addressed by considering the lives that women lead in a contextual way. Measures must be adopted which amount to an effective transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined paradigms of power and life patterns.<sup>587</sup> The vision CEDAW espouses sits comfortably with postmodern, postcolonial, governance feminist and other critiques, which call on rights to consider context, whether that is historical, cultural, institutional or otherwise. While there is a growing consensus regarding the need for rights self-reflection, however, and even some acknowledgement of that by the human rights establishment, those with responsibility for rights implementation and enforcement repeatedly fail to take their own advice.

Although there may currently be a consensus among human rights advocates that polygamy is a form of discrimination and a violation of international law, a wilful blind spot exists when it comes to considering what drives that consensus and whether or not it is the best overall approach to polygamous marriage. Human rights standards fail to reflect the different way in which women experience polygamy or displacement, and the human rights establishment does little to rectify that. The key to making rights protections more effective lies in identifying and accepting where they fail and instigating change. As Darian Smith points out, the law is a cultural artefact, reflecting deeply held cultural assumptions—assumptions that not only can, but must, change as societies change.<sup>588</sup> The on-going, increasing movement of people around the globe is but one factor which may make any resistance to that change unsustainable. The requirement for homogeneity that entitles women to benefit from legal and human rights protection as members of an esteemed group is becoming increasingly difficult to defend and calls for rights to be more democratic and inclusive, particularly of women, are becoming more common.<sup>589</sup> As Monique Deveaux comments:

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587 UN Committee for the Elimination of All Forms of Discrimination against Women 'General Recommendation 25' on Article 4, Paragraph 1 of the Convention on the Elimination of All Forms of Discrimination Against Women, on Temporary Measures, adopted at the Thirtieth Session of the Committee on the Elimination of Discrimination against Women (2000), paragraph 10.

588 Darian Smith (n 368) 42.

589 Deveaux (n 379) 55 discusses attempts to limit, reform or prohibit cultural practices being perceived at best as unwanted intrusions, and at worst, as oppression. Deveaux's observation goes on to echo that expressed by Shah (n 11), particularly regarding domestic polygamy, in that such measures very often serve only to strengthen the custom in question.

*... proposals for the reform of cultural practices that are derived from the mere application of liberal principles (however laudable) risk misconstruing the actual or lived form of these practices; as such they may ... perpetuate, or even worsen, the many forms of oppression faced by vulnerable members of social groups, such as women.*<sup>590</sup>

The problem, then, is not with rights, but rather the restrictions on who makes and defines them, and therefore, what rights have to say. Consequently, the solution is not to abandon rights for failing some women, but to develop a rights discourse which acknowledges this disparity in power and which redresses the balance.<sup>591</sup> For these reasons, this work argues strongly for the full protection of human rights to be extended to women in polygamous refugee families. Rights still have a valuable role in advancing women's equality, and they may be used to the advantage of all women.<sup>592</sup> First, because rights universality requires that such individuals ought not to be excluded from having the benefit of rights protection simply because they are displaced and not citizens. Second, whereas the current approach to polygamy risks undermining human rights and harming vulnerable women, change which is led by marginalised groups will benefit them, and be more likely to promote the long term legitimacy and value of human rights as a result.

## Conclusion

This chapter has attempted to provide a renewed feminist understanding of formal attitudes to polygamy, in an effort to avoid automatically making traditional assumptions about the 'problem of polygamy' and the most appropriate response. It has addressed the concerns of those who would argue Islam and feminism are mutually exclusive, providing evidence to

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<sup>590</sup> Deveaux (n 379) 20.

<sup>591</sup> Marks (n 478) 313; Chinkin (n 39) 212, quoting Patricia Williams.

<sup>592</sup> There is a growing feminist discourse which argues that rights can be used to women's advantage and that despite the difficulties of rights, especially for women, there is some utility in using 'rights talk'. Marshall, Jill (n 582) describes Mullally in *Gender Culture and Human Rights: Reclaiming Universalism* (Hart, 2006) as suggesting the human self simply needs re-defining and that way the universalist moral theory of rights does not have to rely on essentialist definitions of the human self.

challenge the view that Islam is universally oppressive to women. It has explored the opinions of Muslim commentators who have said such assumptions are based either on mistake or bias, rejecting what might be presented as paternalistic and misguided concern for the plight of Muslim women.<sup>593</sup> Adhering to the call by some Muslim feminist scholars for a New Enlightenment of sorts, while inevitably anchored in my own perspective, it is also rooted in the idea that it is imperative for Muslim women to have an equal opportunity to forge their own feminist path.

This chapter has undertaken not just to argue successfully in favour of that proposition, but also attempt to build a bridge from traditional condemnation of Islamic practices like polygamy to exposing the paradoxical nature of polygamy regulation, and find tangible theoretical methods for privileging the perspectives of other women. This is done in part precisely because Muslim women are very unlikely to feel liberated by feminism that is imposed from the outside.<sup>594</sup> To allow for a more fluid approach to a practice that is much derided in the West, this chapter has applied a postmodern feminist understanding of polygamy, challenging what is considered ‘natural’ with regard to marriage and women’s rights, and re-presenting that as a view which is socially constructed and informed by power and dominance. By using a postmodern feminist vernacular this work has sought to re-frame the way polygamy is viewed without losing sight of marginalised women, and their rights, offering an alternative feminist discourse in support of those women affected by polygamy restrictions.

The postmodern discussion in this work is multifaceted. It involves not just pitting mainstream feminist agendas against postmodern feminist aims, or traditional Muslim practices against those that are ordinarily considered more progressive and which seek to deny marital recognition in the name of emancipation. Rather, it requires the consideration of a much more complex set of evolving issues around domestic laws, rights, the nature of families and marriage, culture, religion, institutionalised power and women’s day-to-day lives.

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<sup>593</sup> Azizah al-Hibri (n 489) 3.

<sup>594</sup> Azizah al-Hibri (n 489) 3.

By turning the feminist lens to a different angle, this work has aimed to show that the domination of the discussion on polygamy, immigration and rights by white western women and their male colleagues has promoted a skewed agenda. It has sought to take up the suggestion by Chinkin and Charlesworth to challenge the what they call ‘privileged and historically dominant knowledges’ in order to counterbalance the impact of their reproduction and reinforcement by the establishment.<sup>595</sup> Every effort has been made to reveal the detriment in defaulting to Western feminist ideals as a normative paragon for a civilised society; a revelation which demands that the legal human rights establishment move beyond traditional liberal feminist boundaries to consider factors they have previously ignored. This chapter has also argued that, in addition to its position of privilege and power, traditional feminism is no longer able to articulate or advocate adequately for women’s needs (if indeed it ever was), meaning those standards which have been informed by liberal feminist values ought no longer to have authority for determining women’s lives and rights. As Frug has said, it is perhaps only when ‘woman’ cannot coherently be understood that women’s oppression will be undermined.<sup>596</sup>

In that regard, the discussion on governance feminism has sought to show a link between a dominant feminist liberal agenda and institutions that establish domestic laws and human rights standards, a link which has long been responsible for their content. The aim has been to de-marginalise those who practice polygamy and allow perspectives other than those that dominate in the West to influence the content of laws and rights which govern plural marriage, particularly concerning family reunification for refugee families. The purpose in bringing other voices to domestic and international discussions on polygamy has been to provide a fuller account of the lives of those who experience plural marriage in an abandoned transnational space, to include those women who have typically been ignored by governing institutions, whose needs have not been prioritised by governments or the international human rights movement. As women, Muslims and non-citizens they are situated firmly on the periphery of the corridors of power and any interaction they have with feminist aims ordinarily results in

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595 Chinkin (n 39) 21.

596 Frug (n 544) 1075.

the imposition of liberal values, rather than an acknowledgement of their experience or their capacity for agency.

The aim, here, is to ask that the establishment recognise ‘other’ women and to call for a fresh perspective which results in better outcomes for a broader class of women. Inside that broad aim, this work has identified one issue among the many that are relevant. By applying a postmodern critical eye to the reasoning of the state and the international community in universally and unconditionally condemning polygamy, their stance is presented as resting on an unsteady foundation. The effective categorisation of polygamous wives as living, breathing evidence of the harmful practice of polygamy, so tainted they must be excluded entirely from society, becomes problematic. It is especially problematic when the outcome is indefinite family separation, with all of the risk to personal safety that brings, for women in particular.

Some readers will undoubtedly still be sceptical about the suggestion that recognising polygamy may better for women, and will feel great discomfort at doing so. Where such concerns about the practice of polygamy persist, however, it remains important to consider whether it is right to punish those who practice it. Rather like the regulation of sex work, where laws impose a disproportionate punishment on women, even if regulation is not targeted at them directly, it is only fair to consider that impact and make changes as a result. In that regard, the approach recommended in this thesis aims to acknowledge the reality of women’s lives, seeking a fairer solution the necessary balancing act carried out by policy makers, legislators and human rights promoters when they are considering competing ideological priorities and practical outcomes as they define the content of laws and rights.

Here, it is worth reciting again Eve Darian Smith’s reference to the law as a ‘dynamic artefact’, a quality she says must be recalled to promote long term co-operation, peace and security. This is one of the aims of this work, to suggest change not only for women, but for rights themselves and for the benefit of societies more broadly. As Darian Smith suggests, because culture is dynamic, so the law must be too, to respond to the constant process of change. This work aims to scratch beneath the complacent surface of what she calls the ‘veneer of national and international legal stability’ to face directly what lurks there and deal openly with it. Rather than allowing the fear espoused by rising nationalist rhetoric which seeks to exclude the ‘other’

and preserve the cultural values of the majority, the reality of difference is faced head on in prescribing a path which balances majority view against the effects of that view on others.<sup>597</sup>

With specific regard for the future of polygamy regulation, the challenge now lies in convincing the state and the international human rights community of the need to counteract the long influence of mainstream, more powerful groups, including feminists, and their role in reducing the legitimate jurisdiction of 'women' to a location with strict mainstream feminist borders. To that end this chapter has sought to make a practical contribution, however small, to transnational thinking on a subject with inter-jurisdictional challenges. The significance of doing so, although located in the experience of a relatively small group of women, ought not to be underestimated. Where law and rights are approached differently from the outset the transformative potential may be harnessed to benefit women, bolster the reputation of human rights and promote security and dignity for all.

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597 Bailey and others, *Expanding Recognition of Foreign Marriages* (n 69) 27 refer to Patrick Parkinson 'Taking Multiculturalism Seriously: Marriage Law and the Rights of Minorities' (1994) *Sydney Law Review*. 16, 472, who has argued that "...the importance of preserving the inherited cultural values of the majority must be balanced against the effects of such a law on the minority's capacity for cultural expression."

## **Chapter 6**

### **Conclusion**

Given the litany of harm commonly associated with polygamy this work might be accused of being provocative in suggesting that polygamous wives should be entitled to family reunion in the United Kingdom. That accusation is rejected. Rather than being radical, in offering a reinvigorated feminist understanding of polygamy, law and rights, this work proposes a return to those values that the state and the human rights establishment already claim to respect and hold dear: universal dignity and honouring the humanity of the most vulnerable, such as those who are fleeing conflict and seeking refuge.

The transnational abandonment of refugee women to a space outside the boundary of domestic and international assistance presents a problem. Not only does it have an impact on the lives of those affected, it highlights structural hypocrisy and contradiction. It also presents the problem of the liberal rhetoric which informs local laws and international rights, in that it is taken for granted as representing a universal truth which outlines that which is 'good' for all. While my own experience, anchored in precisely that liberal ideology, may continue to mean that I struggle to accept some of the facets of religious polygamy myself, I am certain that this analysis of the treatment of polygamous families remains fundamentally worthwhile, because the exclusion of displaced additional polygamous wives says so much about the values we choose to privilege and the effects we choose to ignore, individually and as a society.

In that regard, the primary aim of this work has been to demand that, whatever we choose to exclude or promote, we do so consciously, without blindly following the 'usual' approach. Whether this is in relation to the regulation of polygamy, the creation of women's rights or the treatment of refugees, this is vital; particularly in a rapidly changing and increasingly globalising world. However reasonable it might first seem to exclude polygamous wives, their exclusion might also be viewed as reflecting a form of modern day lip service to historic domination, with devastating outcomes for women and their families. Crucially, precisely because it is so often women whose lives have become the flash point for tension in multicultural spaces, applying a renewed feminist understanding to the treatment of polygamy



is also essential. It is vital not to settle for the ‘exhaustion’ and ‘disorientation’ that is so often now associated with feminist discourse.<sup>598</sup> Rather, it is better for women, as well as likely to be more productive in changing societies, to establish a feminist approach to practices like polygamy which has no desire to reject, tolerate or coerce the ‘other’. Doing so will allow the ‘polygamy question’ to move on from simply asking ‘how different is too different?’ to a more nuanced set of analyses like: who experiences that difference, in what environment is that difference experienced and how does that experience of difference manifest for this particular person?<sup>599</sup>

Moreover, in the current climate of geopolitical insecurity and domestic uncertainty, where cracks appear in the foundations for laws and rights, it is likely to be more fruitful in the long term to repair those cracks, rather than paper over them and simply hope for the best. Building walls because we fear difference, whether the walls are physical, legal or ideological, is not likely to be productive. Doing so in the face of rapid globalisation and societal change, in particular, is likely only to undermine the foundation for law and rights, risking their very survival in the longer term. Not least of all because, in the context of this work, it is not just displaced Muslim women who are harmed by the treatment of plural relationships or the fact of globalisation which demand a refreshed understanding of other cultural practices. There are other groups among whom ‘poly’ relationships are growing. The fact is that the law will need to consider plural relationships as societies continue to change for a range of reasons, and different conceptions of ‘the family’ become more prominent.

To that end, it is hoped this work has successfully interrupted what has long been thought of as ‘normal’ in the West with regard to plural relationships and their regulation. The formal treatment of polygamy has provided a useful vehicle for an ideological interruption because the harmful impact of the established epistemology regarding the ‘other’ is laid bare in the experience of rejected additional, Muslim wives. This work has attempted to unpack and complicate the ontological foundation that has informed the exclusion of these women, to reveal bias, hypocrisy and harm. In confronting this missing constituency in mainstream

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598 Knop and others (n 446) 654.

599 Knop and others (n 446) 654.

feminism, human rights activism and domestic law making it is hoped that the voices of those who would resist the imposition of a pre-determined identity, morality and—in this case, a fixed definition of what it means to be a ‘woman’ and a ‘family’—are more likely to be heard.

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## TABLE OF ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEAS	Common European Asylum System
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	Court of Justice of the European Union
ESC	European Social Charter
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
HRC	Human Rights Committee
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
WLUML	Women Living Under Muslim Laws